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CASES ARGUED AND DETERMINED
MASSACHUSETTS IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

FEBRUARY 1910—MAY 1910

HENRY WALTON SWIFT
REPORTER

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JUSTICES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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HON. WILLIAM CALEB LORING.

HON. HENRY KING BRALEY.

HON. HENRY NEWTON SHELDON.

HON. ARTHUR PRENTICE RUGG.

ATTORNEY GENERAL

HON. DANA MALONE.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

HELENA M. LORD *vs.* SHERER DRY GOODS COMPANY.

Bristol. October 25, 1909. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence, In management of department store.

At the trial of an action against the proprietor of a department store by a child five years and eight months of age for injuries caused by being pushed down a stairway by a crowd in the store, it appeared that the child and her mother had been at a counter on a balcony between the first and second floors and were returning down a stairway to the first floor when the accident happened. The only means of access to the balcony, which was forty feet by one hundred feet, was by a stairway of ordinary dimensions and construction, consisting of two flights of stairs with a landing between. There was evidence tending to show that the stairway was poorly lighted, that the store was crowded, that there was a bargain sale of jewelry going on at a counter within six feet of the head of the stairs leading from the balcony to the first floor, and that just before the accident the superintendent of the store made an announcement in a loud voice the natural result of which was to attract crowds to the jewelry bargain counter. The plaintiff's mother testified that, holding the plaintiff by the hand, she was going down the stairway from the balcony to the first floor when persons rushing from behind her to avoid the crowd assembling at the jewelry counter pushed the plaintiff from her and down the stairs. *Held*, that there was no evidence that would have warranted a finding that the defendant was negligent in leaving the stairway as it was, or that the accident was in any way due to the poor lighting of the stairway; and that under the circumstances there was no duty on the part of the defendant to warn his customers as to the stairway.

TORT for injuries received by the plaintiff, a girl five years and eight months old, by being pushed down a stairway by a
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crowd in the defendant's department store in Fall River. Writ dated October 16, 1907.

The case was tried before *Bishop, J.* The plaintiff's evidence tended to show that the accident to the plaintiff happened on a Saturday, that the plaintiff's mother, with the plaintiff, had come to the store to buy ribbon, and that the store was crowded. The ribbon counter was on a balcony, which was between the first and second floors of the store. The only access to this balcony from the first floor was by means of a stairway four feet five inches wide, composed of two flights and a landing. In the lower flight there were five risers, and in the second flight seven. The landing was four feet four inches by six feet two inches. There was some evidence that the stairs were poorly lighted. A corresponding stairway ran from the balcony to the second floor.

From the top of the stairway from the first floor an aisle ran toward the right along the balcony. The area of the balcony was forty by one hundred feet. About six feet from the head of the stairs and running from them parallel to the aisle, stood a counter upon which on the day of the accident was displayed jewelry, of which there was a special sale.

The plaintiff's mother had finished her purchases and, taking hold of the plaintiff's left hand with her right, was proceeding toward the stairway leading to the first floor, when the superintendent of the store, standing at the head of the stairs, announced in a loud voice, "Here's where you get your seventy-five cent and one dollar jewelry for nine cents." The plaintiff's mother testified that thereafter, as she was going down the stairway holding the balustrade with her left hand and the plaintiff's hand with her right, a crowd rushing upon her from behind to get away from the crowd collecting at the jewelry counter pushed the plaintiff from her, and the plaintiff fell down the stairs to the landing and was injured.

At the close of the evidence the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions, which after the death of *Bishop, J.*, were allowed by *Stevens, J.*

C. A. MacDonald, for the plaintiff.

D. F. Slade, for the defendant.

HAMMOND, J. There was nothing in the shape, construction or condition of the stairway which was unusual or which would

warrant a finding of negligence in leaving it as it was. In this respect the case differs from cases like *Hendricken v. Meadows*, 154 Mass. 599, and *Toland v. Paine Furniture Co.* 175 Mass. 476; *S. C.* 179 Mass. 501, which are cited by the plaintiff. And even if the stairs were not well lighted, it is manifest that the accident was in no way due to that fact.

Upon the question whether there was any evidence of negligence of the defendant in attracting a crowd of customers to his store and in failing to take measures to protect them from each other, the case presents more difficulty. It has been often adjudged that a common carrier is held to the exercise of proper care to protect his passengers from injury by reason of the jostling, pushing or other rough act of a crowd which he allows to collect in his cars or upon his platforms, especially elevated platforms. *Treat v. Boston & Lowell Railroad*, 131 Mass. 371. *Kuhlen v. Boston & Northern Street Railway*, 193 Mass. 341, and cases cited. It is contended by the plaintiff that on the day in question a crowd of customers had been drawn to the defendant's store by advertisements issued for that purpose; that while the store was thus crowded an announcement was made by one of the defendant's servants calling particular attention to a certain jewelry counter as a place where articles were for sale at a very low price; that this counter was situated near the stairway and that this announcement was calculated to cause and did cause a rush to that counter; that such a rush might be dangerous to people on the stairs, especially to children of the age of the plaintiff, and that this danger might and ought to have been foreseen and provided against by the defendant.

It cannot be said however that a merchant is negligent simply because he has his store crowded with customers, or because while the store is crowded he directs their attention to some part where they can get good bargains. That is what the store is for.

And while it is not difficult to conceive of a case where the path to the place to which the customers are called may be so dangerous or the place itself may be so dangerous as to make it the duty of the merchant to warn the customers (*Hendricken v. Meadows*, 154 Mass. 599), we do not think that under the circumstances of this case there was any such duty resting on the

defendant. The stairs were of ordinary construction, and the defendant had the right to assume that under the circumstances there was no reason to anticipate any danger to those upon them.

Exceptions overruled.

JAMES MADEN vs. VICTORIA C. WOODMAN.

Middlesex. November 8, 1909. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Evidence, Best and secondary. Landlord and Tenant, Tenant's liability for rent.

The declaration in an action of contract alleged that one F. leased certain premises to the defendant, who covenanted in the lease with F. and his assigns to pay a certain rent monthly; that F. conveyed the premises to the plaintiff by a deed, a copy of which was annexed to the declaration and in which F. assigned his rights under the defendant's lease to the plaintiff; and that the defendant had failed to pay certain portions of the rent. At the trial, the plaintiff was the only witness and testified, among other things, without objection that he was the owner of the premises, that after he purchased them he collected rent from the defendant under the lease and that the defendant continued to occupy the premises until a day in May when he vacated them and had paid no rent since. The deed containing the assignment by F. to the plaintiff was not introduced in evidence. *Held*, that there was evidence which warranted a finding that the plaintiff was the owner of the reversion of the premises; and that as owner of the reversion he could maintain an action in his own name for the rent due under the lease.

MORTON, J. This case is here on the defendant's exceptions to the refusal of the presiding judge* to give certain rulings asked for, and to the order directing the jury to return a verdict for the plaintiff for the full amount claimed. The first instruction requested was "That upon all the evidence the plaintiff is not entitled to recover." At the argument before the full court all of the exceptions were waived except that to the refusal to give this instruction. We understand the waiver to include the exception to the order directing a verdict for the plaintiff, and are confirmed in this view by the fact that the question before the court is stated on the defendant's brief as follows: "The sole question to be determined in this case is:— Having de-

* *Hutchcock, J.*

clared upon a contract of lease for rent due thereunder, can the plaintiff recover without proving his connection with said contract of lease either by assignment to himself or otherwise?" The defendant contends that the plaintiff offered no evidence to connect himself with the lease declared on; or, as stated in another place on his brief, the contention is that "The plaintiff has not proved any written assignment to himself nor any privity of contract between himself and the defendant." There is no contention or denial that if the plaintiff is entitled to recover anything he is not entitled to recover the whole amount claimed; nor is there any contention that the plaintiff did anything which operated as an abandonment or impairment of his rights if he had any under the lease. The plaintiff was the only witness and the defendant's whole contention is now, in substance and effect, that upon the plaintiff's evidence, assuming it to be true so far as material, he is not entitled to recover under the lease because no privity of contract between him and the defendant has been shown. As we understand the way in which the case was left, this is the only question which is now before us. No issue as to the credibility of the witness and no objection that the evidence was not submitted to the jury has been raised or argued.

The declaration alleges that certain persons as trustees of the Boston Finance Association executed to the defendant a lease, of which a copy is annexed, of the premises in question, for two years from August 15, 1906, and that thereafter said trustees conveyed said premises to the plaintiff by a conveyance of which a copy is also annexed to the declaration. From the copy of the deed which is annexed to the declaration it appears that the premises were conveyed "subject . . . to existing leases which are hereby assigned to the grantee." The lease was put in evidence, but the deed was not, so far as appears from the bill of exceptions. The plaintiff however was permitted to testify without objection that he was the owner of the premises and had owned them since June 30, 1906; that after he purchased the premises he collected rent from the defendant under the lease until May 9, 1908; and that the defendant continued to occupy them down to that time, and had paid no rent since. All of this evidence was uncontradicted, and it seems to have been assumed

by all parties that it was a correct statement of what had taken place. If true, as, according to our view of the case the parties assumed without question that it was, it showed that the plaintiff was the owner of the reversion, and as such it is plain that he could maintain an action in his own name to recover the rent due under the lease. *Burden v. Thayer*, 3 Met. 76. *Grun-din v. Carter*, 99 Mass. 15. This being the only matter in controversy, and the facts being undisputed, it follows that the exceptions must be overruled.

So ordered.

A. E. McCleary, for the defendant.

R. J. Cram, (*F. M. Sawtell* with him,) for the plaintiff.

**FRANK FECHTELER & others vs. JOHN Q. A. WHITTEMORE
& another.**

Middlesex. November 9, 1909. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Contract, Construction, Performance and breach. Sale, Delivery. Practice, Civil, Exceptions, Judge's charge. Words, "Satisfactorily."

A manufacturer and dealer in shoe polishes, who maintained boot blacking stands with signs upon them in various parts of the country, after negotiations with a dealer in cards called "transfer signs," letters from which could be used in substitution for painted letters on signs for advertising, the negotiations relating in part to the question whether the transfer signs would stand exposure to all kinds of weather, gave to the dealer in cards an order by letter for four thousand sets, the letter stating, "It is understood and agreed that you are to send us not more than twenty-four sets as soon as ready, and after a thorough trial we find that they do not work satisfactorily this order is to be cancelled." Fourteen sets of cards were shipped at once, and other shipments were made amounting to four thousand sets, all billed as of a year after the fourteen sets were sent. The purchaser refused to accept the shipments. *Held*, that under the circumstances the term "satisfactorily" meant "satisfactorily to a reasonable man"; and that, if there had been a reasonable opportunity to test the cards and if the purchaser as a reasonable man acting in good faith should have accepted them, then he should pay for them.

If at the time of a sale no agreement is made to the contrary, it is sufficient if the goods sold are ready at the vendor's place of business at the appointed time, and therefore at the trial of an action upon an account annexed for goods shipped to the defendant in response to an order in writing which read, "You can enter our order for" goods, part "to be sent when ready," and the rest "six months after

the first shipment," a charge to the jury, that "ordinarily, unless there is some agreement to the contrary, a delivery to a common carrier is a delivery to the purchaser," was not strictly accurate. Exceptions thereto by the defendant here were not sustained however, because the instruction did the defendant no harm, since, the order stipulating that the plaintiff should ship the goods to the defendant, a delivery to the carrier was tantamount to a delivery to the defendant.

If the conditions of a certain sale are that the purchaser is to have ample opportunity to test the goods and that he may refuse them and cancel the order in case after an adequate test they are not satisfactory to him as a reasonable man acting in good faith, a premature delivery of the goods by the vendor to the purchaser cannot operate to the prejudice of the vendor if, after having had an adequate opportunity to make such a test, the purchaser, if he had acted in good faith, and as a reasonable man, should have been satisfied with the goods.

At the trial of an action for the price of certain goods alleged to have been sold to the defendant by the plaintiff, the conditions of the sale being that the defendant was to have ample opportunity to test the goods and that he might refuse them and cancel the order in case after an adequate test they were not satisfactory to him as a reasonable man acting in good faith, the defendant asked the presiding judge to rule that the burden was on the plaintiff to show that certain samples sent worked satisfactorily after a thorough trial, or that the defendant waived the condition of the contract. The presiding judge refused to rule as requested, but, while in his charge to the jury he did not in terms say anything about the burden of proof, the jury must have understood from the language of the charge that the plaintiff could not recover unless he showed that the defendant had had sufficient time to test and examine the goods and that he ought to have been satisfied with them as a reasonable man. *Held*, that the defendant was not harmed by the refusal of his request.

CONTRACT upon an account annexed for the price of cards called "transfer signs," letters from which could be used in substitution for painted letters on signs for advertising. Writ dated July 27, 1906.

The case was tried before *Stevens, J.* There was evidence tending to show that the defendants were engaged in the manufacture and sale of shoe polishes and furnished boot blacking stands which were placed in charge of bootblacks in various parts of the country; that one Smith, an agent of the plaintiffs, solicited an order from the defendants, for the transfer signs, that the question whether the signs would stand exposure to all kinds of weather was discussed between Smith and one Pessels, the defendants' purchasing agent, Smith asserting that the signs would do so, and that finally the following letter was written to the plaintiffs by the defendants' purchasing agent:

"Cambridge, A. Mass., U. S. A., March 29, 1904. Messrs. Palm, Fechteler & Co., New York, N. Y. — Gentlemen: You

can enter our order for 4000 sets at 20¢ a set 2000 to be sent when ready, 2000 six months after the first shipment. It is understood and agreed that you are to send us not more than 25 sets as soon as ready, and after a thorough trial we find that they do not work satisfactorily, this order is to be cancelled without cost to Whittemore Bros. & Co. Yours truly, Whittemore Bros. & Co. Pessels."

Fourteen sets of cards were then sent to the defendants by the plaintiffs and on August 23, 1904, were put upon some of the defendants' stands by Smith. Two thousand and seventy-six sets of the cards were sent to the defendants on August 24, 1904, which the defendants refused to receive, contending that the cards had not received the test stipulated for in the letter of March 29, and the defendants informed the plaintiffs by letter that "your shipment of August 24 will be left at the depot . . . at your risk and expense."

After some extended correspondence, the plaintiffs wrote to the defendants on October 1, 1904, a letter containing the following: "We have shipped you these goods in perfect good faith. If, now, you want a trial of six months, we are perfectly willing to give it to you; all that we ask is, that you accept these goods that we have shipped so as to take them from the railroad company — whose notice we send you here. We will date your bill six months ahead, and if at that time you are satisfied with these goods and they are exactly what you contracted for, and as per reading of your contract, we will then expect you to make settlement. If they are not according to contract, you can ship them back to us at that time just as well as the present time. In plain words, we want you to know and feel that we are not trying to do anything, or want to do anything that is not in accordance with our contract, and we trust that you will meet us in the same spirit; you are perfectly good for what you contract for, and we are perfectly good for what we contract for, so that there is no difference on this score, and we look forward to your advices." No further letter being received from the defendants meantime, a further shipment of two thousand cards was made to the defendants on March 31, 1905, which the defendants refused to accept, referring by letter to what they had written to the plaintiffs during the previous year.

At the close of the evidence, the defendants asked for the following rulings:

"1. On all the evidence the plaintiffs are not entitled to recover on their declaration."

"8. Under the terms of the letter of March 29, 1904, the defendants were not called upon to accept a shipment of more than twenty-five sets until after those twenty-five sets had worked satisfactorily after a thorough trial, or that condition had been waived by the defendants."

"16. If two thousand or more sets of transfer signs were shipped addressed to the defendants within a day or two after the defendants were first shown how to apply the signs by the plaintiff's agent, such shipment was not a performance of the defendants' order of March 29, 1904."

"19. A mere delivery of the signs to a railroad company would not be a delivery to the defendants."

"20. A mere delivery of the signs to a railroad company would not be a delivery to the defendants, unless it appeared that the defendants assented to such a delivery as a delivery to them."

"21. There is no evidence that the defendants assented to a delivery of the signs to a railroad company as a delivery to the defendants."

"22. Under the letter of March 29, 1904, the defendants were under no obligation to pay any freight upon the sets."

"23. If the defendants did not agree to pay any part of the cost of carriage, the delivery of the signs to a freight station in Boston or Cambridge will not constitute a delivery to the defendants."

"31. The defendants were under no obligation to accept the second lot of approximately two thousand sets of letters at the time when they were shipped on or about April 1, 1905."

"36. The burden is upon the plaintiffs to show that the twenty-five sets, after a thorough trial, worked satisfactorily, or that the defendants expressly or by their conduct waived the condition that they should work satisfactorily."

The rulings were refused and the judge charged the jury as stated in the opinion. The jury found for the plaintiffs; and the defendants alleged exceptions.

J. P. Studley, for the defendants.

F. P. Garland, for the plaintiffs, submitted a brief.

MORTON, J. The contract was partly in writing and partly oral, and it was rightly left to the jury to determine what the contract was and whether it had been performed by the plaintiffs. The jury were also rightly instructed that the defendants were not bound to accept and pay for the goods until they had had a reasonable opportunity to test and examine them, nor unless they were satisfactory to them, if they acted in good faith and did what they ought reasonably to have done to decide whether the goods were or were not satisfactory. In other words, the substance of the instructions in regard to the question of satisfactoriness was that the defendants were not bound to accept and pay for the goods unless they were satisfactory, and that they were entitled to sufficient time "whether . . . three, or four, or six months, or a year," to determine whether they were satisfactory, and that it was for the jury to say, taking all of the circumstances into account, whether the defendants had had a reasonable time to test and examine the goods, and, if that were so, then whether as reasonable men acting in good faith towards the plaintiffs the goods should have been accepted as satisfactory, and if they should have been, then the defendants were liable; otherwise not. This was correct and afforded the defendants no just ground for complaint. *C. W. Hunt Co. v. Boston Elevated Railway*, 199 Mass. 220. *Cashman v. Proctor*, 200 Mass. 272. *Noyes v. Commercial Travellers Eastern Accident Association*, 190 Mass. 171, 182. *Lockwood Manuf. Co. v. Mason Regulator Co.* 183 Mass. 25. *Lovett v. Farnham*, 169 Mass. 1, 5. *Page v. Cook*, 164 Mass. 116. *Hawkins v. Graham*, 149 Mass. 284. The contract related to an article of merchandise to be used for purely business purposes and assumed that it would be satisfactory if after a proper trial it ought to be, and that the defendants would thereupon accept and pay for it. It was not intended to be left to the whim or caprice or even altogether to the good faith of the defendants to say whether the goods were satisfactory. Under the circumstances the term "satisfactorily" must be held to mean "satisfactorily to a reasonable man," and the jury were so instructed.

If nothing is said about delivery it is sufficient if the goods are ready at the vendor's place of business at the appointed time. Benjamin on Sales, (6th ed.) § 682. It was not therefore strictly accurate to say, as the trial judge did, that "ordinarily, unless there is some agreement to the contrary, a delivery to a common carrier is a delivery to the purchaser." That would be true if intended to apply to cases where goods were to be sent by the vendor from one city or State to the vendee in another city or State. But the instruction did the defendants no harm because, according to the order of March 29 the goods were to be shipped to the defendants by the plaintiffs, and, in the absence of any agreement to the contrary, the presumption would be that they were to be so shipped at the defendants' expense. Under such circumstances delivery by the vendor to a common carrier operates, as already observed, as a delivery to the buyer. *Fragano v. Long*, 4 B. & C. 219. Benjamin on Sales, (6th ed.) § 693.

The defendants contend that the goods were sent before they should have been. But if the delivery was premature, which we do not intimate, it could not have operated to the prejudice of the defendants since the jury were expressly instructed that the defendants "were under no obligation to finally accept the goods until they had an opportunity to test them and find whether they were satisfactory."

Although nothing was said in so many words about the burden of proof, it is plain, we think, that the jury must have understood from the tenor of the charge that the plaintiffs could not recover unless they showed that the defendants had had sufficient time to test and examine the goods and that they ought to have been satisfied with them as reasonable men. Nothing in the charge implied that the defendants were bound to show that the goods were not satisfactory.

What we have said disposes of the questions raised by the requests for rulings. We think that the charge dealt adequately with the issues presented.

Exceptions overruled.

FREDEBICK L. SCANLAN vs. GEORGE G. PAGE BOX COMPANY.
PATRICK J. SCANLAN vs. SAME.

Middlesex. November 9, 1909. — February 23, 1910.

Present : KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Employer's liability, In a factory.

The principal and usual exit from the second floor of a box factory to the office was by a well lighted passageway three or four feet wide, on the right hand side of which was a bench about three feet high upon which was a circular saw, about five inches of which protruded above the bench. The belts and shafting which ran the saw were in full view. On the bench also was a carriage which was used to push boards along the bench parallel to the passageway upon the saw. The saw was provided with a hinged cover or guard which generally was over it, but which occasionally was removed so that large boards could be sawed. From that part of the bench where the saw was, slanting into the passageway about a foot to the floor, ran strips of board. The lower part of the saw was covered with a blower. The end of the bench away from the exit made a corner around which persons went when passing to the office. The saw was between two and four feet from that end. The saw was not started and stopped by a shipper, but by machinery in the basement of the factory. A boy thirteen years and ten months of age, who had been employed in the factory about a week and who had received no warning or instructions with regard to the saw, was passing, after the whistle for shutting down had blown, around the end of the bench and into the passageway to the office when his coat caught on something, he reached around with his hand to free it, his hand came into contact with the saw and was cut off. At the time there was no operator at the bench. *Held*, that the presence of the saw and the danger of injury from coming into contact with it were obvious risks which the boy assumed when he entered upon his employment; and that the additional danger from the cover's being removed occasionally was not hidden and did not entitle the employee to additional warning; that, therefore, the injury was not caused by any negligence for which the employer was responsible.

TWO ACTIONS OF TORT, the first for personal injuries received by the plaintiff while in the employ of the defendant at its box factory and caused by his hand being cut off by a circular saw as he was freeing his coat which had become caught on something as he was passing through a passageway beside which the saw was. The second action was by the father of the plaintiff in the first for loss of services and for expenses caused by the son's injury. Writs dated August 13, 1907.

The cases were tried together before *White, J.* There was evidence tending to prove the following facts:

There was a well lighted passageway three or four feet wide which was the principal and usual exit from the second floor of the factory to the office. On the left hand side of the passageway as one went out of the room were lockers. On the right hand side and bounding it was a bench three to three and a half feet high, to which the circular saw upon which the plaintiff was injured was attached. There was a carriage on rollers on top of the bench about an inch high, on which the boards to be cut were placed. The method of operation was for the workman to push the carriage away from him along the bench parallel to the passageway toward the saw. The carriage ran just inside the saw. The saw was circular, about a foot in diameter, and was on the outer side of the bench next to the passageway. About four or five inches of its diameter was above the bench. The lower half of the saw was covered with a blower which reached out about a foot. From the bench on either side of the saw to the floor of the passageway were strips of board at such an angle that they reached the floor about a foot out into the passageway from the bench. These strips were for the purpose of deflecting the sawed boards. There was a guard provided for the upper half of the saw. It was bolted to the bench and had a hinged top. It left an opening of an inch or so on the side toward the operator, but completely covered the saw edge on the top and the other side, that is, the edge toward a person using the passageway as an exit. The end of the bench to which one using the passageway as an exit first came made a corner around which persons using the passageway had to pass, and the saw was between that corner and the operator and about two to four feet from the corner.

In the ordinary use of the saw it was operated with the guard in place. Occasionally, however, particularly when large boards were to be cut, the guard was removed. The saw was operated by a belt from a pulley on the ceiling of the floor below. There was no "shipper" or other similar device directly in connection with the saw, and when once started it could not be stopped without going to the floor below.

The plaintiff was thirteen years and ten months old at the time of the accident. He went to work for the defendant on July 1, 1907. On Saturday morning, July 6, 1907, the factory

was to close at half past twelve. The plaintiff with his hat and coat on was going down to the office to get his pay. As he came around the corner, turning to the right, his coat in some way caught on the bench. On what it caught or just how it caught, he did not know. He started to release himself with his left hand, turning from left to right, and the saw took off his left hand at the wrist. Until he was cut he did not know that there was a saw there. Nobody had ever called his attention to this saw or warned him about it in any way, and on the day he was hurt nobody had said anything to him about, or had called his attention to, the guard being removed from the saw. When he was hurt the saw was still running though there was no workman at the bench.

At the close of the evidence the presiding judge ordered verdicts for the defendant, and reported the cases as stated in the opinion.

H. Bancroft, (W. Shuebruk with him,) for the plaintiffs.

J. Lowell & J. A. Lowell, for the defendant.

MORTON, J. These two actions were tried and argued together. The first is by a minor for the loss of his left hand while in the defendant's employ, and the second is by his father for loss of services. We shall speak of the minor as the plaintiff. A verdict was ordered for the defendant in each case and the cases were thereupon reported to the full court. If the ruling was right judgment is to be entered on the verdicts. If wrong, judgment is to be entered for the plaintiff in the sum of \$2,000 and for the father in the sum of \$500.

We think that the ruling was right. The plaintiff assumed the obvious risks of the service into which he entered. The defendant owed him no duty to change the arrangement of the saw bench and passageway or its manner of doing business. It was not bound, for instance, to provide a device for stopping the saw as soon as the whistle blew, instead of leaving it to come gradually to a stop as the power died down. The plaintiff took the place as he found it with all of its obvious risks. The only thing of which the plaintiff can by any possibility complain is that the fact that the saw might be left unguarded while in motion constituted a hidden danger of which he should have been warned. But he did not need to be told that if his hand came

in contact with a revolving saw it would be injured, and the defendant had no reason to anticipate that such an accident as occurred was liable to happen, and therefore could not be said to have been negligent in failing to warn him of it. The passageway itself was well lighted and three or four feet wide; and the saw bench and the arrangement of the saw upon it were in plain view. No duty rested upon the defendant to point them out to the plaintiff. The plaintiff could not have helped seeing them if he had looked. Neither was there anything which could be fairly called a hidden danger. The lower part of the saw was covered with a blower, and a guard bolted to the bench with a hinged top was provided for the part of the saw above the bench. Ordinarily the saw was used with the guard on. Occasionally, however, it was operated without the guard. But the whole arrangement was an obvious one, and the fact that the saw was operated occasionally, as it had to be from the nature of the work, without the guard, did not render the danger, if any, arising from so operating it to one going along the passageway a hidden danger of which he was entitled to warning. What happened would seem to have been the result of pure accident. If there was any element of negligence in it, the negligence was that of a fellow servant in failing to put back the guard. *Wosbigian v. Washburn & Moen Manuf. Co.* 167 Mass. 20. *McCafferty v. Lewando's French Dyeing & Cleaning Co.* 194 Mass. 412. *Simoneau v. Rice & Hutchins*, 202 Mass. 82. In *Flynn v. Prince, Collins & Marston Co.* 198 Mass. 224, the box was not taken off in the operation of the machinery, and it was held that the arrangement of the dressing-room could be found to be negligent unless the shaft was covered by the box.

Judgment on the verdict.

**JAMES MARTIN, administrator, vs. BOSTON AND NORTHERN
STREET RAILWAY COMPANY.**

Suffolk. January 10, 1909. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, Street railway, Gross, Causing death, Res ipsa loquitur. Evidence, Presumptions and burden of proof, Opinion: experts. Practice, Civil, Conduct of trial. Witness, Cross-examination.

The declaration in an action against a street railway company under R. L. c. 111, § 267, to recover for the death of a passenger who received injuries resulting in death because he jumped from the front seat of an open car of the defendant when there was an explosion in the electric controller, alleged that the death resulted from gross negligence on the part of the defendant's servants or agents. At the trial the plaintiff introduced evidence of the happening of the explosion, but did not introduce any independent evidence to show that there was anything defective or improper in the construction or operation of the car, although he did introduce evidence tending to show that previous to the explosion the car had been running smoothly, that it had stopped and started in the ordinary way, and that there was nothing unusual about it. *Held*, that under the circumstances it could not be said that the explosion of itself furnished evidence of such conduct on the part of the defendant's servants or agents as to constitute gross negligence.

While the general rule is that the final decision of the question, whether a witness is qualified as an expert, is for the judge presiding at the trial, nevertheless, when the facts upon which the decision depends are undisputed, the question becomes one of law, and the decision may be reviewed.

The fact that a witness is not offered as an expert by the party calling him will not prevent the other side from using him as such if it turns out that he has the necessary qualifications.

At the trial of an action against a street railway company for personal injuries alleged to have been caused by an explosion of the electric controller on one of the defendant's cars on a certain evening, a witness for the defendant, besides testifying at length in description of the electrical equipment of the car and of the controller in question, stated that he had examined the controller on the evening of the accident and "found it O. K." He also testified in direct examination that he was employed by the defendant as foreman of its electrical equipment from 1892 to 1903, and had been working as an electrician in the employ of another person since 1903. In cross-examination he was asked as to his experience with a controller and stated that he could take it apart and put it together again and that he understood its principle and mechanism "to a certain extent. I don't know as I understand it the same as an expert would." He then was asked certain questions which called for his opinion as an expert. The presiding judge subject to an exception by the plaintiff excluded "anything in the nature of an opinion." *Held*, that the facts regarding the qualifications of the witness were not so clear and undisputed that it could be said as a matter of law that the trial judge was wrong in excluding the opinion of the witness as evidence.

TORT for the conscious suffering and death of the plaintiff's intestate alleged to have been caused by her jumping from a street car of the defendant when there was an explosion in the electric controller. Writ dated November 20, 1901.

The case was tried before *Gaskill, J.* It appeared that the plaintiff's intestate was a passenger on one of the cars of the defendant running from Swampscott through Lynn to Boston. The car was an open car with a glass partition at either end. The plaintiff's intestate was seated on the right hand end of the seat directly behind the motorman with her back to the front partition and to the inside of the car. As the car was proceeding there was a loud report or explosion followed by flashes, flames and smoke which emanated from the controller box on the front end of the car. In the excitement which ensued, the plaintiff's intestate jumped from the car, struck the ground on her head and sustained injuries from which subsequently she died.

The course of the trial is described in the opinion. After the rulings of the presiding judge there set forth, there was evidence introduced by both sides bearing on the questions, whether the death of the plaintiff's intestate was caused by corporate negligence of the defendant, whether she suffered consciously, and whether such conscious suffering was caused by negligence with which the defendant was chargeable.

The testimony of the witness Campbell referred to in the opinion, bearing on whether he was qualified to testify as an expert was as follows: In direct examination he testified that at the time of the trial he was an electrician working for a firm in Lynn, with whom he had been since August, 1903, that from 1892 until August, 1903, he was employed by the defendant as foreman of the electrical equipment, the electrical department at West Lynn, that as such foreman he had charge of all the electrical equipment of the cars, saw that they were equipped and, when they came in, if there was anything wrong he looked them over and repaired them or saw that they were repaired, that he put in controllers, motors and trucks, that the work of putting in motors and controllers was done under his direction and once in a while he assisted personally, that he had charge of the trucks, seeing that the trucks were in good shape and in good

order right through. He testified in great detail as to the equipment of the car upon which the accident happened. In his cross-examination questions were asked and answered as follows: "Q. What experience have you had with a controller? A. Well, I can take one apart and put it together again. — Q. Well, do you understand its principle and mechanism? A. Well, to a certain extent, I don't know as I understand it the same as an expert would. — Q. Well, you understand the principle of the electric power and also the controller to such an extent that in the event of the insulation being worn off, and that car being in motion, that that is liable to produce a friction and a flame, don't you? A. Yes, sir. — Q. You also understand the principle, do you not, of the resistance box, the effect of the burning out of one, or the removal of a panel? A. Well, if the panel was burned out and he shut his controller off it wouldn't take the arc. — Q. It wouldn't take the arc? A. No, the arc would be in the controller instead of in the panel box. — Q. And what would be the result of that, the consequence of that, assuming that the car was in motion? A. A flame or a flash in the controller would be so created that it would have to come out somewhere, having formulated a gas, that would blow out the controller cover."

There was a verdict for the defendant; and the plaintiff alleged exceptions.

Other facts are stated in the opinion.

J. P. Fagan, (*D. G. Hill, Jr.*, with him,) for the plaintiff.

D. E. Hall, for the defendant.

MORTON, J. The declaration as amended was in four counts. The third count was a statutory count for the death of the plaintiff's intestate "by reason of the negligence and carelessness of the defendant and the unfitness and gross carelessness of its agents and servants while engaged in its business"; and the fourth count was at common law for conscious suffering caused by the negligence and carelessness of the defendant and its agents and servants. The plaintiff put in his case and rested. When he rested the counsel for the plaintiff stated to the presiding judge that he relied on the third and fourth counts only and that he waived the first and second. In reply to a question by the judge the plaintiff conceded that up to that point there was

no evidence of the unfitness of the servants and agents of the defendant. Thereupon the defendant rested as to the gross negligence and carelessness of the defendant's agents and servants as alleged in the statutory count. The judge then ruled that there was no evidence of the gross negligence or carelessness, or of the unfitness of the defendant's servants and agents, and declined to submit the case to the jury on those issues and limited the plaintiff under the third count to the questions of the negligence of the corporation itself. The plaintiff duly excepted, and the first question relates to the correctness of the rulings thus made.

The plaintiff relies on the doctrine of *res ipsa loquitur*, as applied to the circumstances of this case, to show that there was evidence warranting a finding that the accident was due to gross negligence on the part of the defendant's servants and agents. An accident may no doubt happen under circumstances which, in the absence of any explanation, without anything more, would warrant a finding that it could not have occurred except for gross negligence and carelessness on the part of the defendant's servants or agents. See *McNamara v. Boston & Maine Railroad*, 202 Mass. 491. But negligence to be gross must include an element of carelessness so great that the court or jury can say that there was not only an absence of the due care that should have been exercised, but also a degree of negligence materially greater than that which would constitute ordinary negligence. No doubt what would be gross negligence under one set of circumstances might not be so under another; and no doubt, also, the highly dangerous consequences to be apprehended in one case might contribute to render that gross negligence which would not be such in another case.

In the present case the plaintiff introduced no independent evidence to show that there was anything defective or improper in the construction or operation of the car. On the contrary the uncontradicted testimony of the plaintiff's witnesses was that, down to the instant of the explosion, the car had been running smoothly and that it had stopped and started in the ordinary way, and that there had been nothing unusual about it. Under such circumstances it cannot be said that the explosion of itself furnished evidence of such conduct on the part of the de-

defendant's servants and agents as to constitute gross negligence. The plaintiff has not argued that there was any evidence of the unfitness of the defendant's servants or agents. We think that the rulings excepted to were correct.

The plaintiff also excepted to certain rulings in regard to matters of evidence. The defendant called as a witness one Campbell, who testified that he was foreman of the electrical equipment of the defendant during a period which covered the time of the accident; and after stating what his duties were he went on to describe the construction and operation of the cars used by the defendant. He also testified that he examined the car in question on the night of the accident, and after describing certain tests that he made in regard to the controller and the result of them, he was permitted to answer without objection that the conclusion to which they led him was that the controller was "O. K." He further testified as to the condition in which he found other parts of the mechanism, and what he did in the way of causing repairs to be made. On cross-examination the plaintiff sought to use him as an expert, and for that purpose, after the witness had testified that the insulation was scorched on some of the wires, asked him, assuming that the insulation was worn off, what effect that would have upon the use and operation of the controller. This was objected to and excluded on the ground that the witness had not been put on as an expert. After some further questions and answers in regard to the principles and operation and results in certain cases of electric power, which were evidently put to bring out the knowledge of the witness in regard to such matters the witness was asked, "Now from your study of this case and from your familiarity with the principle of the resistance box did you form any opinion as to when that was burned out, or blown out?" And again, "Did you form an opinion as to what was the cause of the burning of the panel?" Upon objection both questions were excluded, the presiding judge stating in substance, later, that anything in the nature of facts could be shown by the witness, but anything in the nature of an opinion was excluded.

It is no doubt true, as contended by the plaintiff, that while the general rule is that the question whether a witness is quali-

fied as an expert is for the trial court, nevertheless, when the facts upon which the decision of the question depends are undisputed, the question becomes one of law, and the decision of the trial court may be reviewed. *Muskeget Island Club v. Nantucket*, 185 Mass. 303. It is also no doubt true that the fact that a witness is not offered as an expert by the party calling him will not prevent the other side from using him as such if it turns out that he has the necessary qualifications. In the present case, while the witness showed great practical familiarity with the equipment and operation of electric cars, and might well have been allowed to express his opinion, we do not think that the facts in regard to his qualifications were so clear and undisputed that it can be said as matter of law that the presiding judge was wrong in excluding the questions which it did.

We do not understand that any ruling was asked for or any exception saved in regard to the witness's testimony at the former trial.

Exceptions overruled.

GEORGE CARTER vs. BOSTON AND NORTHERN STREET
RAILWAY COMPANY.

Middlesex. November 10, 1909. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Negligence. Street Railway. Carrier, Of passengers. Evidence, Of assent by silence.

In an action against a street railway corporation for personal injuries alleged to have been sustained while the plaintiff was boarding a car of the defendant as a passenger, if there is evidence tending to show that at a signal from the plaintiff the car had come to a stop at a usual stopping place, and that when the accident occurred the plaintiff was in the act of entering the car with one foot upon the step without any objection or warning from the conductor, who was standing in the doorway which the plaintiff was about to enter, a finding is warranted that the plaintiff was a passenger when he received his injuries.

In the use of the kind of street railway car which is called semi-convertible and in which the doors are opened and shut by a device operated by the motorman, it is not necessary that the door to admit passengers should be entirely open in order that an assent to the entrance of a passenger may be inferred from the silence of the conductor who is standing in the doorway. It is enough to warrant

such an inference of assent if the door is open so far that the person proposing to enter as a passenger is justified in believing that the opening is intended to afford him an opportunity to enter and no objection to his doing so is made by the conductor.

In an action against a street railway corporation for personal injuries alleged to have been sustained while the plaintiff was in the act of entering a car of the defendant as a passenger, if it appears that the car was of the kind which is called semi-convertible and in which the doors are opened and shut by a device operated by the motorman, and the evidence tends to show that the door when nearly open came to a stop and then started to open farther, that the plaintiff, believing that the doorway was ready for him to enter, it being in the evening and very dark, in feeling for the handle of the door or the rail put his hand upon the door itself and that the door in opening the rest of the way cut off the end of his finger, and if it also appears that during this time the conductor was standing in the doorway and was silent and gave the plaintiff no warning, it cannot be ruled as matter of law that the plaintiff was not in the exercise of due care in placing his hand upon the door instead of upon the handle of the door or upon the rail next to it to assist him in entering.

It cannot be stated as a general proposition of law that a conductor of a street railway car is not bound to warn a person intending to enter the car not to place his hand on a door that is in the process of opening, because the circumstances may be such that the conductor has reason to apprehend that a person intending to enter the car may sustain an injury in entering it by placing his hand on the door which is in the process of opening, if he is not warned, and in that case it is the duty of the conductor to give such a warning.

In an action against a street railway corporation for personal injuries alleged to have been sustained while the plaintiff was in the act of entering a car of the defendant as a passenger, if it appears that the car was of the kind which is called semi-convertible and in which the doors are opened and shut by a device operated by the motorman, and the evidence tends to show that the door when nearly open came to a stop and then started to open farther and in opening the rest of the way cut off the end of the plaintiff's finger, there being other evidence tending to show that the plaintiff in placing his hand on the door was in the exercise of due care, a finding is warranted that the plaintiff's injury was due either to negligence on the part of the motorman who operated the lever which opened and shut the door or to some defect in the construction of the car.

TORT for personal injuries alleged to have been received by the plaintiff on the evening of September 24, 1907, at or near the corner of Lowell Street and West Street in Wilmington, by reason of getting his finger caught in the rear door of a car of the defendant which he was entering as a passenger. Writ dated November 25, 1907.

In the Superior Court the case was tried before *Bell, J.* The plaintiff testified that he was sixty-nine years of age; that he was a crossing tender or gateman at Grove Street in Wilmington for the Boston and Maine Railroad; that on the night in question he waited about twenty-five minutes for the car, which

was twenty minutes late ; and that he signalled to the motorman to stop the car. He then testified as follows: "The car door was about half the length of the car back. I stepped back to the car door. This car was a semi-convertible car ; the doors, operated by the motorman, open and shut. I stepped back to the door, supposing it was ready for me to enter. The door was opened and I supposed it was ready for me to enter. I reached up for the railing to catch hold with my hand, and at the same time stepped on to the step and as I did so, the door started to open farther and took my finger right into the panel, taking the end of it right off, and at the same time [I] kind of felt a little pitch forward, kind of pitched into the car at the same time." He testified further that it was very dark ; that there was no street light there ; and that he thought that it was cloudy and had been raining before he left his work ; that there was a light in the vestibule of the car, but not a very bright one ; that this was a regular stopping place of the car ; that the conductor stood in the car doorway, and that the plaintiff was directly within his range of vision ; that the conductor did not say a word ; that the plaintiff did not hear a warning of any kind ; that he was not aware at the time he entered that there was any danger connected with the door ; that these cars with the doors worked by the motorman had then been in operation fifteen or sixteen months ; that he never had had on entering such a car the experience of the door starting back farther ; that he was not aware that the door was likely to start back after it had come to rest ; and that he supposed the door was as far open as it was going.

The testimony of other witnesses showed that on the cars called semi-convertible when the door starts to open the step begins to drop ; and that when the door is open twelve inches the step is fully down, and after that there is no connection with the door ; and that in the case at bar the step came down when the door was open about a foot.

Other evidence and the findings warranted by the evidence are stated in the opinion. At the close of all the evidence the defendant asked the judge to make certain rulings, including those which are quoted in the opinion. The judge refused to make any of the rulings requested and submitted the case to the

jury. At the close of the charge the defendant "excepted to that portion of the charge wherein the court left it to the jury to say whether a man can become a passenger on a car such as this before the door is entirely open."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

S. H. E. Freund, for the defendant.

E. F. McClennen, for the plaintiff.

MORTON, J. This is an action of tort for personal injuries. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the presiding judge to give certain rulings that were requested and to that portion of the charge which left it to the jury to say whether the plaintiff could become a passenger before the door was entirely open. All of the rulings requested except rulings 2, 3 and 5 have been waived. Those are as follows:

"2. There is no legal duty on the part of a conductor to warn a person intending to take a car not to place his hand upon a door which is in the process of opening. 3. There is no evidence in this case that the car was of improper design or construction." "5. If the plaintiff in feeling for the handle of the door before the door was entirely open accidentally put his hand upon the door of the car, thereby catching his finger and causing it to be crushed, he would not be entitled to recover for there would be no evidence of negligence on the part of the defendant."

We think that the rulings thus requested were rightly refused, and we see no error in the rulings and instructions that were given. It was for the jury to say whether the plaintiff had become a passenger at the time when he was injured. There was evidence tending to show that the car had come to a stop at a usual stopping place, at his signal, and that when the accident occurred he was in the act of entering the car, with his foot upon the step, without any objection or warning from the conductor who was standing in the doorway. This evidence, if believed, warranted a finding that the plaintiff was a passenger when injured. Evidence introduced by the defendant would warrant the inference that the plaintiff attempted to board the car before it came to a full stop and before the conductor had a

chance to warn him; but what the facts were in regard to the matter was plainly for the jury. The plaintiff could not become a passenger without the assent, expressed in some form, of the conductor. Such an assent might be understood from the absence of any objection. It was not necessary to constitute such an assent that the door should be entirely open. It was enough if it was opened so far that the plaintiff was justified in believing that it was intended to afford him an opportunity to enter and no objection was made to his doing so by the conductor.

It could not be ruled as matter of law that the plaintiff was not in the exercise of due care in placing his hand upon the door instead of upon the handle or the rail next to it, to assist him in entering, if he believed, as he testified that he did, that the door was open, and he received no warning to the contrary from the conductor. Neither could it be ruled as a general proposition of law that a conductor was not bound to warn a person intending to take a car not to place his hand upon a door that was in the process of opening. If the circumstances were such that a conductor would have reason to apprehend that a person intending to take a car might sustain injury in entering it by placing his hand upon a door that was in the process of opening, if not warned, then in the exercise of the high degree of care required of him it would be his duty to give such warning. The second request was therefore properly refused. The plaintiff's testimony tended to show that the door came to a stop when nearly open and then started again. This could have been found to be due either to negligence on the part of the motorman who operated the lever which opened and shut the door, or to some defect in the construction of the car. The third request could not therefore have been properly given. The fact that the plaintiff in feeling for the handle may have accidentally put his hand upon the door before it was entirely open would not prevent him from recovering if he was in the exercise of due care and the injury which he received was due to the negligent manner in which the door was operated or to a defect in the construction of the car. The judge therefore properly declined to give the fifth request.

Exceptions overruled.

WILLIAM GILLIGAN COMPANY vs. JAMES J. CASEY, & trustee,
BYRON R. MITCHELL, claimant.

Suffolk. November 11, 1909. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Name. Assignment. Words, "Future earnings," "Future wages."

In the absence of fraud and where both parties act in good faith, an individual contractor may make a lawful contract to furnish materials to a city under a name which purports to be that of a corporation and may make a lawful assignment in writing of the money which he is to receive under the contract, signing it in such corporate name by a certain person as president, although there is no corporation of that name and the only connection with the contract of the person named as president is that of a foreman employed by the contractor.

The money to be received under a contract to furnish a city with sand, gravel and crushed stone is not "future earnings" within the meaning of St. 1905, c. 308, nor "future wages" within the meaning of St. 1906, c. 390.

If a person, who holds an assignment in writing of the price to be received by a contractor under a contract to furnish a city with certain materials, causes the assignment to be recorded in the office of the city clerk of the city where the assignor resides, this has no effect upon the construction of the assignment and cannot convert it into an assignment of "future earnings" within the meaning of St. 1905, c. 308, which requires such a recording to make an assignment of future earnings valid against a trustee process.

CONTRACT by a corporation for the sum of \$108.70 as the price of sand, gravel and crushed stone furnished by the plaintiff to the defendant, a contractor, the city of Boston being summoned as trustee. Writ in the Municipal Court of the City of Boston dated December 10, 1907.

The trustee, in its answers to interrogatories filed by the plaintiff, admitted that it had in its possession moneys due to the defendant to an amount greater than the sum claimed in the plaintiff's writ, but stated that these moneys were claimed by one Byron R. Mitchell under an alleged assignment from the defendant. On motion of the plaintiff an order of notice was issued to Mitchell, who appeared and filed a statement of claim.

On appeal to the Superior Court the case was heard by Sanderson, J., without a jury. The assignment under which Mitchell claimed the funds in the hands of the trustee was as follows:

"Know all men by these presents that we, the Bay State Contracting Company of Boston County of Suffolk and State of Massachusetts in consideration of one dollar and other valuable considerations to us paid by B. R. Mitchell of Boston aforesaid (the receipt whereof is hereby acknowledged) do hereby sell, assign and transfer to said Mitchell all and whatever sum or sums of money now due and coming due to us from the city of Boston, a municipal corporation of said Boston. To have and to hold the same to the said Mitchell with power to collect the same in his name and as our attorney, hereunto duly authorized to his own use. It is expressly understood, however, that the said are forever to be kept and saved harmless by the said from all cost or charge hereafter in any way or manner, for and from the expense of the collection of the sum and sums hereby sold and assigned. In witness whereof, we have set our hands and seals this tenth day of June, 1907.

"Bay State Contracting Company,
Thomas Hurley, Pres." [Seal]

Below was a certificate, signed by the assistant city clerk, that the assignment had been received, entered and examined at a certain hour on June 13, 1907.

The claimant contended that the signature of the assignment was in the name under which the defendant was doing business with the city. The plaintiff contended that it was a fictitious name used by the defendant without notice to his creditors and was adopted by him for the purpose of concealing from them his contracts with the city of Boston and his assignments of money due under these contracts, and contended that through the use of this name the plaintiff was not notified of the assignment by the record; and further contended that the assignment was an assignment of future earnings under St. 1905, c. 808, and St. 1906, c. 890, and was void for want of compliance with the provisions of those statutes.

The claimant testified in his own behalf as follows: The witness is a broker by occupation. The defendant on June 10, 1907, signed in his presence and delivered to him the assignment, signing it in the name "Bay State Contracting Company, -

Thomas Hurley, President." The witness took it to the city clerk's office and had it recorded. The consideration for the assignment was an advance of \$36 made on that day and advances of money to be made thereafter, for the purpose of carrying out a contract which the defendant had with the city of Boston for the construction of a macadam roadway on a street called Fenwood Road, this contract being signed and executed in the name "Bay State Contracting Company, Thomas Hurley, President." The witness subsequently furnished the defendant with moneys for that purpose in reliance on the assignment, amounting to \$4,700, and collected from the city of Boston under the assignment before the service of the plaintiff's writ the sum of \$2,978.99, leaving due to him from the defendant at the time when the writ was served the sum of \$1,721.01, including interest.

On cross-examination the claimant testified that when he got the assignment recorded he made no effort to have it recorded in the name of the defendant as assignor, and that he had never in his business dealings with the defendant seen any sign with the name "Bay State Contracting Company" at his place of business.

James J. Casey, the defendant, called as a witness by the claimant, testified in substance as follows: The witness's occupation at the time the writ was served was that of a contractor. From 1902 to 1906 he had worked for the city of Boston as a foreman. On May 28, 1907, he entered into a contract with the city of Boston for the construction of a macadam roadway in Fenwood Road. The contract was signed "Bay State Contracting Company, Thomas Hurley, President." The witness was doing business under that name. On June 10, 1907, he executed the assignment as printed above, signing it in the same way, and delivered it to the claimant. The consideration for the assignment was money furnished by the claimant to the witness for the performance of the Fenwood Road contract of May 28, 1907. Money was furnished to him by the claimant, as testified to by the claimant, when the witness needed it to pay the men or for other purposes, and at the time of the service of the writ upon the trustee there was due to the claimant from the defendant the amount stated by the claimant. The witness did

not do manual work as a laborer on the contract job, but "bossed" it or had a general superintendence of the work. He had a foreman in his employ named Thomas Hurley.

On cross-examination, the defendant testified that he had received and used the sand, gravel and crushed stone referred to in the plaintiff's declaration to the value of \$3.60 on this and the rest on former contracts. The bill for it was made out in his name, and he made no objection to this when he received it. When he arranged with the treasurer of the plaintiff for the furnishing of these materials he alone talked with the treasurer. The witness then did not mention any Bay State Contracting Company, nor any other corporation, nor Hurley, nor anybody except himself. Previous bills were sent by the plaintiff to the witness made to him personally. The witness had personally paid these to the plaintiff's treasurer, and had not mentioned the name of any company. There was in fact no such corporation. The Boston directory of 1907 showed the name of James J. Casey, contractor, but did not show any Bay State Contracting Company. The witness had no sign at his place of business with that name. Thomas Hurley was not the president of any corporation. He used Hurley's name because Hurley was a non-union man, and the pavers, who were union men, would not work with him unless he was supposed to be on the contract,—that is, unless he was supposed to be part owner of the work. The witness was the only person interested in his business. Hurley did not share in profits or losses. The witness "bossed" the job.

The counsel for the claimant stated that he did not contend that the defendant was equally as well known in business under the name of "Bay State Contracting Company" as under his own name.

The plaintiff asked the judge to make the following rulings:

"1. The burden of proof is upon the claimant to prove a valid assignment to him.

"2. There can be no valid assignment by any person, which is good against attaching creditors, unless the assignment is made and recorded by him in his own name, or, if in another name under which he does business, unless that name is one under which he is, as matter of fact and notoriety, equally well known as by his individual name.

" 3. The assignment under which the claimant claims title to the fund in question was an assignment of future earnings under St. 1905, c. 308, and was invalid as against the plaintiff as an attaching creditor, because it was such an assignment as is made invalid by that statute.

" 4. The assignment under which the claimant claims this fund was invalid because it was an assignment of wages under St. 1906, c. 390, and did not conform to the requirements of that statute.

" 5. In considering whether or not this was an assignment of future earnings, or of wages, the court may take into consideration the construction put upon it by the claimant. The fact that he recorded the assignment is evidence tending to show that he considered it an assignment which required record under the statutes above referred to."

The judge made the first ruling requested, and refused to make the others. He filed the following memorandum of decision: " The court finds that the defendant made a contract with the city of Boston under the name of Bay State Contracting Company, Thomas Hurley, President, and that he assigned the payments to become due under this contract, using the same name, to the claimant for advances of money made on that day and to be made by the claimant to the defendant thereafter, and that at the time when the trustee process was served the defendant was indebted to the plaintiff by reason of such advances in a larger sum than the amount then due the defendant from the city of Boston. The defendant had previously done business under the name of Bay State Contracting Company. One Thomas Hurley was employed by the defendant to perform the defendant's contract. The defendant gave general directions concerning the work to Hurley. He was present while the contract was being performed, on part of each day, and kept a record of the time of the men who worked for him. There was also evidence that at one time he held one end of a line to get a grade, and at another time told a teamster where to dump a load of sand."

The judge found for the claimant in the sum of \$1,721.01; and the plaintiff alleged exceptions.

O. O. Partridge, for the plaintiff.

W. B. Orcutt, for the claimant.

MORTON, J. The issue in this case relates to the validity of the assignment under which the claimant asserts title to the funds in the hands and possession of the trustee. The case was tried in the Superior Court, on appeal from the Municipal Court of the City of Boston, without a jury, and the judge found in favor of the claimant. The defendant was defaulted. The case is here on exceptions by the plaintiff to the refusal of the judge to give certain rulings that were requested by it. The first ruling asked for was given; the others were refused.

The assignment was executed by the defendant in the name of "Bay State Contracting Company, Thomas Hurley, Pres." The judge found that the defendant had previously made a contract with the city of Boston under the same name, and that for advances made when the assignment was executed and to be made thereafter, he assigned to the claimant by the assignment in question the payments to become due under that contract. The judge also found that when the trustee process was served the defendant was indebted to the claimant for a larger amount than the amount then due to the defendant from the city of Boston under the contract. And he further found that the defendant previously had done business under the name of the Bay State Contracting Company. There was no finding of fraud or of anything tending to show that the claimant and the defendant acted otherwise than in good faith.

It is well settled that a person or corporation may assume or be known by different names, and contract accordingly, and that contracts so entered into will be valid and binding if unaffected by fraud. *Minot v. Curtis*, 7 Mass. 441. *Melledge v. Boston Iron Co.* 5 Cush. 158, 176. *Gifford v. Rockett*, 121 Mass. 481. The validity, so far as third parties are concerned, of contracts entered into by a person or corporation under a name other than his or its own proper name does not depend upon whether he or it is as well known by that name as by his or its true name, but upon whether *quoad* the particular transaction, the name is used in good faith by the party adopting it as a *descriptio personæ*. It follows that the second request was rightly refused.

The third and fourth rulings requested were based on a view which treated the assignment as an assignment of future earnings or future wages under St. 1905, c. 808, and St. 1906, c. 890.

The contention thus made is disposed of by *Chester v. McDonald*, 185 Mass. 54. The words "future earnings" or "future wages" in the statutes referred to can have no different meaning from the words "future earnings" in R. L. c. 189, § 84, which were the subject of consideration in that case. The facts in that case were very similar to those in the case before us, and that case must be regarded as decisive of this. The third and fourth rulings requested were properly refused.

The fact that the claimant caused the assignment to be recorded cannot convert into an assignment of future earnings an instrument of a different character or affect the construction to be given to it. The fifth instruction requested was properly refused.

Exceptions overruled.

EDITH L. ANSHEN vs. BOSTON ELEVATED RAILWAY
COMPANY.

Suffolk. November 18, 1909. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Negligence, At station of subway. Carrier, Of passengers. Evidence, Of negligence, Competency.

In an action by a woman passenger against a carrier which operated trains of elevated railway cars in a subway, for personal injuries caused by falling into the space between a car forming part of such a train and the platform of a station in the subway, from which the plaintiff was attempting to enter the car, the plaintiff testified that on account of the crowd she could not look down to see where she stepped and that her movements were constrained by the crowd around her. She also testified that, although she paid no attention to the space between the platform and the car, it was because she thought she "had been going along" and felt that she "was safe, and, knowing that there was a platform there and feeling that it was used," she did not "feel unsafe or uncertain about the ground." This court, in deciding that there was no evidence of negligence on the part of the defendant, was not prepared to say that, had there been such evidence, the question of the plaintiff's due care might not properly have been left to the jury.

In an action by a woman passenger against a carrier which operated trains of elevated railway cars in a subway not constructed by the defendant, for personal injuries caused by falling into the space between a car forming part of a five-car train of the defendant and the platform of a station in the subway, from which the plaintiff was attempting to enter the end door of the second car of the train, it appeared that the platform was nearly straight for a part of its length

and for the rest of its length was on a concave curve, that trains of different lengths were used at different hours of the day, and that during the hours when the traffic was heaviest five-car trains were run, that underneath the permanent platform were five movable or sliding platforms for the purpose of bridging the space between the permanent platform and the cars, that these sliding platforms were operated by means of levers moved by two men on the permanent platform and were intended to be used in connection with the middle doors of the cars but were not intended to be used and were not used for the doors at the ends of the cars, that the distance from the permanent platform to the centre of the door by which the plaintiff was attempting to enter was normally eight inches and might vary two inches more or less owing to the swing and oscillation due to passengers getting in and out and to other causes. One witness testified that by estimation this distance at the time of the accident was nine and one half inches. The same witness testified that she visited the subway on the day after the accident and that the movable platform at the place of the accident then was extended. The evidence tended to show that where the cars and the platform were parallel there was a space of about three inches between them and that this was the least space that could be allowed properly. The plaintiff contended that the defendant was negligent in not using the movable platform or some other appliance at the time of the accident to lessen the space between the permanent platform and the door of the car by which the plaintiff was attempting to enter. *Held*, that, inasmuch as the movable platforms were not installed for use at the end doors, the case should be considered as if there had been no movable platforms, and, assuming that the open space was ten inches, which was the greatest width that it could have been found to be, the existence of this space and the failure to bridge it were not evidence of negligence. In an action by a woman passenger against a carrier which operated trains of elevated railway cars in a subway, for personal injuries caused by falling into the space between a car forming part of such a train and the platform of a station in the subway, from which the plaintiff was attempting to enter the car, the fact that after the accident occurred the defendant took means to prevent a repetition of it is not evidence of negligence.

TORT for personal injuries received on June 8, 1905, by reason of falling into the space between a car forming part of an elevated railway train of the defendant and the platform in the Scollay Square station in the subway in Boston, when the plaintiff was attempting to enter the car, as described in the opinion. Writ dated August 8, 1905.

In the Superior Court the case was tried before *Fessenden, J.*, who ordered a verdict for the defendant, and by agreement of the counsel for the parties and at their request reported the case for determination by this court upon the terms of reservation which are stated in the opinion.

J. E. McConnell, for the plaintiff.

E. P. Saltonstall, (*S. H. E. Freund* with him,) for the defendant.

MORTON, J. The plaintiff, while boarding a train in the Scollay Square station of the subway, fell into the space between the car and the platform and received the injuries complained of. At the close of the evidence the judge directed a verdict for the defendant, and at the request of counsel reported the case for the determination of the full court. If the ruling was right judgment is to be entered for the defendant. If the case should have been submitted to the jury judgment is to be rendered for the plaintiff for \$1,500 damages.

We assume in the plaintiff's favor that the evidence would have warranted a finding that she was in the exercise of due care. She testified in substance that on account of the crowd she could not look down so as to see where she stepped, and that her movements were constrained by the crowd around her. She also testified that, although she paid no attention to the space between the platform and the car, it was because "I thought I had been going along and I felt that I was safe, and knowing that there was a platform there and feeling that it was used I didn't feel unsafe or uncertain about the ground." We are not prepared to say that the question of the plaintiff's due care might not properly have been left to the jury. See *Plummer v. Boston Elevated Railway*, 198 Mass. 499.

But we fail to find any evidence of negligence on the part of the defendant. The platform of the station was nearly straight for a part of the distance, and for the rest of it was on a concave curve. The extreme ends were very narrow, not over two feet in width, and for a distance which was longer at one end than at the other the cars and the platform were nearly parallel, with a clearance of about three inches, which the testimony tended to show was the least that could be properly allowed for. Trains of different lengths were used at different hours of the day. During the hours when there was the heaviest traffic five-car trains were run, and during other hours trains of three and four cars. Of necessity, owing to the manner in which the subway was constructed, with which the defendant company had nothing to do, five-car trains overlapped each end of the platform. That was not so with three or four car trains. Underneath the permanent platform were five movable or sliding platforms for the purpose of bridging the space between the

platform and the cars. These were operated by means of levers moved by two men on the platform, and were intended to be used in connection with the middle doors of the cars. Three-car trains were stopped so that there were sliding platforms opposite the centre doors of the second and third cars, there being no necessity for one opposite the middle door of the first car, as that car was practically parallel with the platform and only three inches from it. On four-car trains there were sliding platforms opposite the middle doors of the second, third and fourth cars, there being none opposite the middle door of the first car for the reason given above in regard to the first car of a three-car train. Five-car trains, partly because of overlapping the platform and partly because the first, second and fifth cars were practically parallel with the platform, were stopped so that there were sliding platforms opposite the middle doors of the third and fourth cars, but none opposite the middle doors of the first, second and fifth cars. Owing to the manner in which the sliding platforms were constructed and the triangular space that would be left, they were not intended for use at the ends of the cars and the uncontradicted testimony was that they were not so used. It was a five-car train which the plaintiff was attempting to board when injured, and she was attempting to enter at the end door of the second car. The distance from the permanent platform to the centre of the door was normally eight inches and might vary two inches more or less, owing to the swing and oscillation of the car, caused by people getting in and out, and to other causes. One witness testified that by estimation the distance on the day of the accident was nine and one half inches. The same witness also testified that she visited the subway the next day after the accident and that the movable platform was then extended.

The plaintiff contends that the defendant was negligent in not using the movable platform or some other appliance so as to lessen as much as possible the space between the permanent platform and the car, and thereby to guard against the danger of such an accident as occurred. But as was said in *Hilborn v. Boston & Northern Street Railway*, 191 Mass. 14, 17, "There always must be a space between the steps of a car running through the subway and the platform upon which passengers

are expected to alight, and passengers must expect this to be so." In the case before us the minimum clearance that had to be allowed for between the cars and the platform was three inches. The plaintiff does not contend that it was necessary, even if possible, to cover that space; and the case of *Willworth v. Boston Elevated Railway*, 188 Mass. 220, is a direct authority to the contrary. This would leave the additional space to be taken care of seven inches at the most, with a possibility that that would be reduced to five, if the normal distance of eight inches from the platform to the centre of the end door be taken into account. We have been referred to no case in which, considering the necessities of elevated and subway railroad construction, it has been held that failure to bridge a space thus existing or liable to exist between the platform and a car constituted negligence on the part of a defendant company. See *Hogan v. Boston Elevated Railway*, 195 Mass. 313, and cases cited; *Ryan v. Manhattan Railway*, 121 N. Y. 126; *Fox v. Mayor of New York*, 70 Hun, 181; *Rothchild v. Central Railroad*, 163 Penn. St. 49. In *Plummer v. Boston Elevated Railway*, 198 Mass. 499, where the maximum space was twenty inches, it was said that if there had been no movable platforms there would have been no evidence of the defendant's negligence. In the case before us the movable platforms were installed not for use at the end doors, but at the middle doors, and therefore the case may be regarded so far as the end doors were concerned as if there had been no movable platforms. Even at its widest, which would be ten inches, the distance would be no longer than the step of a child and very much less than the step of the ordinary man or woman; and the defendant cannot, we think, be justly charged with negligence in failing to guard against such an accident as befell the plaintiff. There was nothing to show that the like ever had happened to any one there before. The fact that after the accident occurred the defendant took means to prevent a repetition of it cannot be regarded as evidence of previous negligence. Nor was there anything in the size or conduct of the crowd on the day of the accident, and on other days at about the same hour, to bring the case within *Kuhlen v. Boston & Northern Street Railway*, 193 Mass. 341. Neither was there anything, as in *Plummer v. Boston Elevated Railway*, *supra*, to show any

negligence on the part of the motorman as to the place where the cars were stopped. The result is that in accordance with the report the entry must be

Judgment for the defendant.

JEROME JONES, executor, vs. GEORGE A. GANE & others.

Norfolk. December 2, 1909. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Devise and Legacy. Words, "Entire estate," "Share," "Amount."

The will of a married woman, who died without issue leaving her husband surviving her, after exercising a power of appointment, and making thereby a certain provision for her husband, which in case of his death before her should become the property of his heirs at law, and after making various legacies, and providing, that, if she should survive her husband, all property to which she should have become entitled from his estate should go to his heirs at law, contained the following provision: "It is my will that my said husband, J., shall have the same share in the residue of my estate which he would have had by law in the entire estate, had no will been made, and, if he is not living at my decease, it is my will that the share which he would have had under this clause shall go to his heirs at law." In a provision in the attesting clause of the will relating to an erasure and the interlining of certain words the foregoing clause was described as "the residuary clause." *Held*, that the clause did not mean that the husband of the testatrix should receive the portion of the whole estate which he would have received in the event of intestacy, and, further, that the clause did not mean that after the husband had received the share described in the clause, the property remaining should be treated as intestate property in which the husband also would share, but that by the provisions of the clause the testatrix had limited and specified so clearly the portion which she intended her husband to receive from the residue of her estate as to amount by implication to a disposition of the balance among her other heirs at law to the exclusion of her husband; that, therefore, the husband should receive the same share of the residue which he would have received if no will had been made, that is, \$5,000 and one half the remainder of the residue, and that the other half of the residue should be distributed among the next of kin of the testatrix.

BILL IN EQUITY, filed in the Supreme Judicial Court on March 4, 1909, by the executor of the will of Maria Elizabeth Jones, who died on June 4, 1908, without issue, leaving an estate of which the residue, after the payment of all debts and all legacies apart from those contained in the residuary clause and the expenses of administration, amounted to about \$500,000,

for instructions as to the distribution which should be made of the residue of the estate.

The will was as follows :

"I, Maria Elizabeth Jones, wife of Jerome Jones of Brookline, in the County of Norfolk and Commonwealth of Massachusetts, make this my last will and testament. After the payment of debts and funeral charges if any, I devise and bequeath as follows :

"It is my will and I hereby appoint under the power contained in the will of William H. Dutton of Boston dated the fifth day of February, A. D. 1875, that of the property now held by trustees under the said will of William H. Dutton, and whereof I have the disposition by this will, two hundred shares of the capital stock of the Boston Transcript Company shall become the property of the grandchildren of Henry W. Dutton in equal proportion, the issue of any deceased grandchild to take by right of representation, provided however that the persons in whom said shares of capital stock would vest under the above provision or some person or persons in their behalf shall within one year after the allowance of this will, pay to my said husband, Jerome Jones, or his personal representatives, or, if my said husband is not living at my decease, then to his heirs at law, one third of the value of the real estate now held by said Boston Transcript Company as ascertained by the last assessed valuation for taxation prior to my decease, and in default of such payment it is my will and I hereby appoint that said two hundred shares of said capital stock shall become the property of my said husband, Jerome Jones, or, if he is not living at my decease, the property of his heirs at law.

"I give to my brother, George A. Gane of Charlottetown, Prince Edwards Island, twenty-five thousand dollars and in the event that he is not living at my decease I give ten thousand dollars to his widow and fifteen thousand dollars to the children of my brother Thomas Frederick Gane, deceased, the issue of any deceased child to take by right of representation the share of such deceased child.

"I further give to the children of my said brother Thomas Frederick Gane, deceased, fifty thousand dollars, the issue of any deceased child to take by right of representation as above.

"I give to Ellen A. Jones of Athol, Mass., five thousand dollars.

"I give to Louise Palmer Chard of New York City five thousand dollars.

"I give to the American Unitarian Association, a corporation established by law in Massachusetts, ten thousand dollars.

"I give to the Young Men's Christian Union of Boston ten thousand dollars.

"I give to the Transcript Mutual Aid Society of Boston ten thousand dollars.

"I give to the Free Hospital for Women, located in Brookline, ten thousand dollars.

"I give to the Industrial School for Crippled and Deformed Children, in Boston, ten thousand dollars.

"I give to the Kindergarten for the Blind, in Boston, ten thousand dollars.

"I give to the Children's Hospital, in Boston, ten thousand dollars.

"I give to the Home for Aged Couples, in Boston, five thousand dollars.

"In the event that my said husband, Jerome Jones, is not living at my decease I give to his heirs at law all property, real or personal, to which I shall have become entitled from his estate.

"It is my will that my jewelry, keepsakes, personal ornaments, trinkets and other articles named in a certain writing or list which I leave among my effects marked and designated as the writing or list referred to in this will, shall not be included in the residue of my estate to which reference is made in the clause herein next following, but shall be disposed of as directed in said writing or list which said writing or list is hereby made part of this will.

"It is my will that my said husband, Jerome Jones, shall have the same share in the residue of my estate which he would have had by law in the entire estate, had no will been made, and, if he is not living at my decease, it is my will that the share which he would have had under this clause shall go to his heirs at law.

"I hereby nominate my said husband, Jerome Jones, to be

the executor of this will, and request that he be exempt from giving surety or sureties on his official bond.

"Witness my hand this twenty-eighth day of November, in the year nineteen hundred and three, the word 'that' being erased and the words 'the share which' being interlined in the residuary clause before signing."

Here followed the signature of the testatrix and an attesting clause with the signatures of three witnesses.

The defendants, besides Jerome Jones in his personal capacity, were George A. Gane, a brother of the testatrix, Henry Stewart Gane, Gertrude Gane and Marjorie Gane, children of Thomas Frederick Gane, deceased, who was a brother of the testatrix, and Kathrene Gane, then the widow of Frederick M. Gane, deceased, who was the son of Thomas Frederick Gane.

The answer of the defendants other than Jerome Jones was in part as follows :

"2. And they say that by law and under the true construction of the will of Maria Elizabeth Jones, one half of the residue of her estate passed to her husband, and the other half to her next of kin.

"3. And for further answer they say that they have been informed that the petitioner is now claiming that by the legal construction of said will he is entitled to three quarters of said residue, and that these defendants as next of kin of the testatrix are entitled to only one quarter.

"4. The defendants deny that such is the legal construction of said will, but they say that if such is the legal construction of said will, the petitioner holds one third of said three quarters, namely, one quarter of said residue, in trust for these defendants for the following reasons :

"5. The testatrix acted greatly under the influence and advice of her husband. She wished to leave one half of the residue of her estate to him, and the other half to her next of kin, and was willing that the share which would come to him if he survived her, should go to his heirs in case he should die before her. He thereupon, knowing her intentions, caused or allowed this will to be prepared, representing to her that the will as drawn expressed her said intentions, namely, that one half of the residue of her estate should go to him or his heirs, and the

other half to her next of kin. She relying on his representations executed said will.

"6. After the death of the testatrix, but before the probate of the will, the petitioner assured these defendants that by said will one half of the residue of the estate of the testatrix was devised and bequeathed to them. These defendants relied on this assurance, and forebore to contest the probate of the said will.

"7. And the defendants say that if the court decrees that by the legal construction of said will three quarters of the residue of the testatrix's estate come to the petitioner, the petitioner after those representations and assurances to the testatrix and to these defendants is trustee for one third of said three quarters, namely, one quarter of said residue, in trust for these defendants, and they pray the court so to decree."

The case was heard by *Braley, J.*, who reported it for determination by the full court as follows:

"The defendants, George A. Gane, Henry Stewart Gane, Gertrude Gane, Marjorie Gane and Kathrene Gane, desiring to offer evidence in support of the allegations made in the fifth and sixth paragraphs of their answer, Jerome Jones, individually, by separate counsel, and also as executor and plaintiff in this case, objected to the admission of any evidence upon the issues sought to be raised by said allegations. At the request of the executor, I ruled that no evidence upon said issues was admissible. And now, with the consent of all parties, I report the case for the determination of the full court, upon the question of the true construction of the will, and also upon the question of the exclusion of evidence, if after determining the true construction of the will, the evidence appears to be material.

"If the court decide that on the proper construction of the residuary clause in the will the defendant Jones is entitled only to \$5,000 and one half of the remaining residue of said estate, and that the defendants Gane, as the next of kin of the testatrix, are entitled to the other half of the remaining residue, a decree is to be made in accordance with such construction.

"If the court decide that on the proper construction of the residuary clause of the will, Jerome Jones is entitled, whether under the will or under the statutes regulating the descent and

distribution of intestate property, or partly under the will and partly under said statutes, to more than \$5,000 plus one half of the remaining residue of the whole estate, then, but not otherwise, my ruling upon the exclusion of evidence is to be considered by the court, and if the ruling is wrong, the case is to stand for further hearing before a single justice solely upon the issues raised by the allegations of the defendants under the fifth and sixth paragraphs of their answer. If the ruling was right, such decree is to be entered as justice and equity require. The words 'remaining residue' in this report are to be taken to mean that part of the whole estate of the testatrix remaining after the payment of debts, charges of administration, legacies bequeathed by clauses prior to said residuary clause, and said \$5,000."

F. H. Darling, for the executor, stated the case.

A. Hemenway & J. R. Dunbar, for Jerome Jones personally.

John Chipman Gray & C. R. Clapp, for the defendants Gane.

RUGG, J. The testatrix died without lineal descendants leaving a husband and collateral kindred. By her will she exercised a power of appointment so as to inure to some extent for the benefit of her husband, and gave \$160,000 in legacies of definite amounts and certain specific legacies. The residue of her estate, after paying these legacies, debts and charges of administration is about \$500,000. The only clause respecting the residue and the construction of which is sought by this petition, is as follows: "It is my will that my said husband, Jerome Jones, shall have the same share in the residue of my estate which he would have had by law in the entire estate, had no will been made, and, if he is not living at my decease, it is my will that the share which he would have had under this clause shall go to his heirs at law." The exercise of the power of appointment and this clause are the only provisions for the benefit of the husband to be found in the will.

There are three possible interpretations of the language employed by the testatrix. It is urged that it means that the husband is to have out of the residue the same amount that he would have had out of the whole estate if there had been no will. The words, "entire estate" are laid hold of and accentuated as manifesting an intent that the husband should have out of the residue that which the law would have given him in

the entire estate in the event of intestacy. If this had been the aim of the testatrix, it would have been simple to express it by apt and unequivocal language. The substitution in the residuary clause of the words "amount out of" for the words "share in" would have accomplished this result. No intelligent person can be assumed to have used "share" under the misapprehension that it was synonymous with "amount." An even more simple and natural way of expressing such an intent would have been to phrase the gift to the husband thus: "the same share in my estate which he would have had by law had no will been made." Moreover, the words "entire estate" are not employed in the residuary clause as one term of the problem in arithmetic by which the sum of the husband's devise is to be computed, but merely as a reference for the purpose of incorporating the proportion established by the law for the distribution of intestate estates. "The residue of my estate" and not the entire estate is the fund to which the fractional share found in the statute of distributions is to be applied. Hence the clause does not mean a devise to the husband of that part of the whole estate, which he would have received in the event of intestacy.

Another possible construction is that the husband alone is provided for by its terms, and that there is intestacy as to the balance of the estate. The practical result of this interpretation would be that the husband would receive out of the residuum of the estate \$5,000 and one half the remainder, and that as to what was left he would inherit as statutory heir \$5,000 again and one half that remainder. Although where sufficient language is lacking to dispose of the entire estate, there is no room for the operation of a presumption, yet where the interpretation is doubtful, the law infers, because it is the commonsense conclusion, that one going to the trouble of making a will would not intend to leave a large part of the estate undisposed of. *Towne v. Weston*, 132 Mass. 513. It is to be observed that here the testatrix, in a note referring to an erasure, describes the clause in question as the "residuary clause." An important characteristic of a true residuary clause is to make a complete, not a partial, disposition of all the property of the testator. *Dresel v. King*, 198 Mass. 546. To thus deliberately refer to the clause as residuary is some indication of what this testatrix thought

she was doing by it. Under these circumstances, a result of partial intestacy ought not to be reached unless the balance of reasonable weight of the testamentary language inclines that way. This view gathers force from the provision at the end of the clause to the effect that in the event of the death of the husband before the testatrix, the share which he would have had under this clause shall go to his heirs at law. Substantially the same provision for the heirs at law of the husband is made in the first clause of the will, where the power of appointment under the will of one Dutton is exercised primarily for the benefit of the husband. Both these provisions seem to indicate a wish that the heirs of the husband should, provided he predeceased the testatrix, receive all the benefactions which would have inured to the husband from her estate had he survived her. This desire would have been frustrated, had the condition arisen to which it was directed, by holding that there is partial intestacy. This conclusion is fortified by the fact that there is also a distinct clause giving to the heirs at law of the husband, in the event of his previous death, all the property to which the testatrix would have become entitled from his estate.

This leads to a consideration of the third possible construction, which is that the testatrix bounded and specified that which she intended her husband to receive from the residue of her estate so clearly as to amount by inference to a disposition of the balance among her other heirs at law. Of course the mere fact that the will contains a legacy to the husband or any next of kin is no indication that such legatee is not to share in an undisposed residuum. *Johnson v. Goss*, 132 Mass. 274. A gift by implication cannot be inferred from silence, but must be founded upon expressions in the will. *Nickerson v. Bowly*, 8 Met. 424, 431. The testatrix used the words "the same share" to designate what her husband was to receive from the residue. These words imply entirety and finality, a finished and consummated expression of benevolent intent, so far as that particular beneficiary is concerned. When "the share" of another in an estate is spoken of, the natural thought is of the whole and complete portion or fraction, which is to be received. When used to mark out an inheritance in an estate the words "the share" do not import that there is something more, outside of and beyond

it, to be otherwise and elsewhere pointed out, but they indicate totality. Weight may be attached the more readily to the exact significance of the words chosen, because the will was drafted by one learned in the law with wide experience in its practical administration. It is argued in opposition to this interpretation that if such had been the purpose of the testatrix she would have made a plain gift to the husband of \$5,000 and one half of the residue. Her intent, however, was not to give to her husband a definite sum, but the proportion which the statutes, not infrequently changed in this regard, might provide at the time of her death. The testatrix, by the use of these words, defined and limited the extent, to which her husband was to benefit out of the residue, to the share devised, and excluded him from any part of what is left. Standing alone the language indicates that he is to receive the specified share, but no more. So far as explicit statement goes, she thus makes a partial distribution only of the residue. But there is a general design, to be inferred from what is expressed, that this clause should be a complete disposition. This is implied from the use of the words "residuary clause" in referring to this part of her will, from the presumption against intestacy, and from the definite and precise expression of limitation of the entire benefit to be received by her husband from the residue, which can be effectuated only by inferring such an intent. When it appears that the testator necessarily intended to make a disposition which is not articulated in formal words, and language enough is employed to show the trend of her thought, such desire will be declared and given effect. The phraseology of the gift to the husband indicates that the testatrix intended that the balance of the residue should go to her heirs at law, excluding her husband, for in no other way can her determination as to his portion be carried out. *Metcalf v. Framingham Parish*, 128 Mass. 370. *Boston Safe Deposit & Trust Co. v. Coffin*, 152 Mass. 95. *Peabody v. Tyszkiewicz*, 191 Mass. 317. *Bund v. Green*, 12 Ch. D. 819. This result follows also from the application of the second part of the rule laid down in *Parker v. Tootal*, 11 H. L. Cas. 143: "Implication may be founded upon two grounds. It may either arise from an elliptical form of expression which involves and implies something else as contemplated by the person using the expression,

or the implication may be founded upon the form of gift, or upon a direction to do something which cannot be carried into effect without, of necessity, involving something else in order to give effect to that direction; or something else which is a consequence necessarily resulting from that direction." It is a necessary consequence of the provision that the husband's share in the residue shall be the same as if no will had been made that the balance of the residue after the deduction of his share shall be divided according to law among the other heirs at law to the exclusion of her husband. Any other construction would result in his receiving a larger share than that specified by the will. Inasmuch as the husband survived the testatrix, the gift in the residuary clause of "the share which he would have had . . . to his heirs at law" has become inoperative, and the residue is to be divided among the same persons and in the same shares as it would have been in the event of intestacy.

The husband is therefore entitled to \$5,000 and one half the remainder of the residue, and the other half of the remainder is to be divided according to law among the next of kin of the testatrix.

Decree accordingly.

RUSSELL LONGLEY vs. NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY.

Essex. January 3, 1910. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Negligence, In use of highway.

At the trial of an action against a telephone company by a boy sixteen years of age to recover for injuries alleged to have been received by him because, while he was driving a covered grocery wagon in a street in a city, the top came into collision with a rope which the defendant had stretched across the street, there was evidence tending to show that the rope was about an inch in diameter and extended diagonally across the street from the top of a pole, on the left hand side of the street as the plaintiff was driving, into the branches of a tree in full bloom on the right hand side of the street, where it was fastened at a point about seven feet from the ground; that the plaintiff was assisting his father in the grocery business by taking and delivering small orders and collecting bills, that at the time when the accident happened he was driving a safe horse at an ordinary trot, and that "for a minute and a half or two to three minutes or some-

thing like that" before the wagon struck the rope, he was turned around on the seat of the wagon, arranging some baskets behind him and was not looking ahead, that he held on to the reins while so doing, and that "the first thing he knew he fell out of the wagon." *Held*, that under the circumstances it could not be said as matter of law that the plaintiff was wanting in due care because as he drove along he was not looking ahead all of the time in anticipation of such a defect in the highway, or that he was negligent in turning around and arranging the baskets in the wagon behind him.

MORTON, J. The plaintiff, a boy of sixteen, was assisting his father in the grocery business by taking and delivering small orders and collecting bills. He was driving a grocery wagon when the top came into collision with a rope stretched across the street by the defendant company, and he was thrown out, receiving the injuries complained of. There was a verdict for the plaintiff and the case is here upon the defendant's exception to the refusal of the trial judge * to rule that upon all the evidence the plaintiff was not entitled to recover.

The bill of exceptions contains the stipulation "that the only ground relied on in support of this exception is that the plaintiff failed to introduce sufficient evidence of due care on his own part." The only question before us relates, therefore, to the plaintiff's due care.

The plaintiff testified "that 'for a minute and a half or two to three minutes or something like that' before he reached the point where the rope was fastened to the tree he was turned around on the seat of the wagon, arranging some baskets behind him, and was not looking ahead; that he held on to the reins while so doing, and 'the first thing he knew he fell out of the wagon.'" The plaintiff further testified that the horse was a safe horse and that he was going at an ordinary trot. He was asked on cross-examination if he could have seen the rope quite a distance down the street if he had been looking ahead, and he answered that he did not know; he should think so. It appeared that the rope was about an inch in diameter and extended diagonally downward across the street from the top of a pole on one side of the street to a tree to which it was fastened on the other side of the street at a point about seven feet from the ground. The plaintiff was driving on the right hand side of the street, about a foot from the curbing. The tree was on

* *Bell, J.*

the same side and extended out over the street and was in full bloom, and "the rope went up to those branches." There were also other trees standing near the one to which the rope was fastened. The wagon was "an ordinary grocer's wagon, a little higher than ordinary," with a top ten or twelve feet high.

The plaintiff was driving along the street * on the side where he had a right to be. There was no sign or warning to indicate that there was any defect in the highway. He had a right to assume that it was reasonably safe for travel. If he had had any reason to be on the lookout for the rope, it is possible that he might have seen it, though, considering its size and the fact that it extended diagonally upward through the branches of the tree, and that there were other trees near it, it may well be doubted whether it would not have required close observation to see it. It cannot be said as matter of law that he was wanting in due care because he was not looking ahead all the time as he drove along, or that he was negligent in turning around and arranging the baskets in the wagon behind him as he drove along. Under the circumstances it was or could have been found to be a natural and reasonable thing to do. As we have said, he had no reason to anticipate any defect in the way; the horse was going at an ordinary trot, and he was holding the reins. The question of his due care was plainly, it seems to us, for the jury. The cases relied on by the defendant are readily distinguishable. See *Talbot v. Taunton*, 140 Mass. 552; *Fox v. Sackett*, 10 Allen, 535.

Exceptions overruled.

The case was submitted on briefs.

S. L. Powers & E. K. Hall, for the defendant.

J. H. Sisk, W. E. Sisk & R. L. Sisk, for the plaintiff.

* Fayette Street in Lynn.

COMMONWEALTH vs. WILLIAM S. BUXTON.

Suffolk. January 4, 1910. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Evidence, Of speed, Experiments, Competency, Best and secondary. Automobile.

At the trial of a complaint for operating an automobile at a rate of speed exceeding twelve miles an hour in violation of a lawful regulation of a board of park commissioners, the Commonwealth offered in evidence an instrument called a photo-speed-recorder, which had been used by the witness who produced it to ascertain the speed at which the defendant's automobile was moving at the time in question, and which consisted of two photographic cameras set side by side, provided with a mechanism which automatically exposed one of the cameras one second before the other one, and also provided with a chronometer arranged as a stop watch. To determine speed by the use of the instrument a formula was employed which made it necessary to know the distance of the external object from the lens of the camera and the distance of the image on the photographic plate from the lens as well as the size of the object and the size of the image. The Commonwealth offered to show that the witness who tested the speed of the defendant's automobile by the use of the instrument, before making the test, had been furnished with and knew the distance of the image from the lens in each camera and that he had photographed ten times with each camera an object at distances varying from thirty to three hundred feet, that he had measured the length of the object and by means of the formula had calculated the distance of the object from the camera, and that afterwards he had measured this distance with a tape and found it to be the same as shown by the estimate. The defendant objected to the evidence of the experiments as inadmissible because of the insufficiency of the experiments and because of the difference of the conditions from those under which the speed of his automobile while in motion was tested by the use of the instrument. *Held*, that the question whether evidence of experiments should be admitted depends largely on the discretion of the trial judge, and that this court could not say as matter of law that the evidence did not justify the judge in coming to the conclusion that the experiments would be useful in determining the speed of the car.

In order that experiments made by means of a machine or mechanical instrument should be admissible in evidence it is not necessary that the machine or instrument should have been operated by an expert, if there is evidence tending to show that accurate results can be reached by the use of the machine by one not an expert.

At the trial of a complaint for operating an automobile at a rate of speed exceeding twelve miles an hour in violation of a lawful regulation of a board of park commissioners, the Commonwealth offered in evidence an instrument called a photo-speed-recorder, which had been used by the witness who produced it to ascertain the speed at which the defendant's automobile was moving at the time in question, and which consisted of two photographic cameras set side by side, provided with a mechanism which automatically exposed one of the cameras one second before the other one, and also provided with a chronometer arranged as a stop

watch. The Commonwealth offered to prove that the chronometer contained in the instrument had been compared by the witness with stop watches carried by two other witnesses and also with the standard chronometer in the physical laboratory of the Massachusetts Institute of Technology and had been found in each case to be accurate. *Held*, that this evidence was admissible and justified the trial judge in submitting the question of the accuracy of the chronometer to the jury, and that the evidence also was sufficient to warrant a finding by the jury that the chronometer was a correct recorder of time.

COMPLAINT, received and sworn to in the Municipal Court of the Roxbury District of the City of Boston on April 28, 1909, for a violation of the rules and regulations of the board of park commissioners of the city of Boston, by operating an automobile on Commonwealth Avenue within the jurisdiction of said commissioners at a rate of speed exceeding twelve miles an hour on April 27, 1909.

The defendant was found guilty and was sentenced to pay a fine of \$20. He appealed to the Superior Court.

In the Superior Court the case came on to be tried before *Wait, J.*, upon an agreed statement of facts. After certain rulings, which are stated below, had been made by the judge, the defendant agreed that a verdict of guilty might be ordered, and alleged exceptions which were allowed by the judge.

The "agreed statement of facts," which included also a statement of the rulings of the judge upon the evidence offered, was as follows:

"1. It was agreed that on or about the twenty-seventh day of April, 1909, the defendant was operating a certain automobile on Commonwealth Avenue, in the city of Boston, on that portion of said avenue which lies to the west of Beacon Street, and that the evidence offered by the Government, if competent, would establish that the defendant was then and there operating said automobile at a rate of speed prohibited by law.

"2. The Government, in order to prove the speed of said automobile on said occasion, offered in evidence a certain instrument, called a 'Photo-Speed-Recorder,' which had been used by the witness producing it to ascertain the speed of the automobile at the time of the alleged violation of the law. This instrument consists of two similar photographic cameras, set side by side in the same box. It is arranged so that each camera takes a picture

with an exposure of approximately one hundredth of a second, and is provided with a mechanism which automatically exposes one camera approximately one second after the other one.

"3. The apparatus is also provided with a chronometer of a stop watch variety so arranged that the shadow of a dial divided into thirtieths of a second is shown, together with the shadow of the hand in its position on the dial, upon the plate in each separate camera, and this is simultaneous with the exposure of the plate in each camera.

"4. In order to use the apparatus for determining speeds the following rule is employed: The distance of any external object from the lens of a camera is as many times greater than the distance of the image on the photograph plate from the lens as the size of the object is greater than the size of the image. Or, as otherwise expressed: The distance of the object equals the distance from the image to the lens times length of object divided by length of image.

"5. In order to prove that the instrument offered in evidence and which was used to test the speed of the automobile in question, when employed in conjunction with the aforesaid rule, was adapted correctly to ascertain distances, the Government offered the following proof: That the witness who made the test in question had, previous to making said test, been furnished with and knew the distance of the image from the lens (i. e. focal length) in each camera; that he had eight or ten times photographed, with each camera, an object at distances varying from thirty to three hundred feet; that he had measured the length of the object; that by employing the focal length, as given to him, the length of object and the length of image (when developed on photographic plate) in their proper places in the aforesaid formula, he had calculated in reference to each of the tests in the aforesaid series, and in reference to each of the cameras as respectively involved therein, the distance from camera to object; that the witness had measured with a tape the corresponding distances from camera to object, and that as measured and as experimentally obtained the results agreed in each case.

"6. The judge ruled that this evidence was competent and admissible for the purpose offered, to which ruling the defendant excepted.

"7. The 'Photo-Speed-Recorder' was used by the witness in the method above described to photograph the rear of the defendant's receding automobile. Then measurements were made by him of the wheel tread (i. e. the distance from the middle line of the tire of one of the rear wheels to the corresponding point on the other rear wheel) of the image on the photographic plates, and of the corresponding length on the automobile. The figures thus obtained, together with the focal length as previously verified, were employed in their proper places in the aforesaid formula, and the distance from the camera to the automobile at the instant of each exposure was thus calculated. Subtracting one distance from the other gave the distance travelled by the automobile between the times of the two exposures. Reading of the watch hand shadow cast with the dial shadow upon the plate gave the time between the two exposures. Making the usual reductions of elapsed time from seconds to hours and of the distance covered from feet and inches to miles, the speed in miles per hour was calculated and found by the witness to be twenty-seven and two tenths.

"8. The Government offered to prove that the chronometer contained in the instrument had been compared by the witness with stop watches carried by two other witnesses and also with the standard chronometer in the physical laboratory of the Massachusetts Institute of Technology and had been found in each case to be accurate.

"9. The judge ruled that said evidence referred to in paragraph 8 was competent, and the defendant excepted to said ruling because no proof was offered as to the correct construction of said chronometer, nor was any proof offered to show that it had been compared with any other timepiece, the correctness of which was proved or could be judicially accepted without proof.

"10. To the ruling of the judge that the evidence as set forth in paragraphs 5 and 8 was competent, the defendant excepted."

The case was submitted on briefs.

P. R. Dunbar, for the defendant.

M. J. Dwyer, Assistant District Attorney, for the Commonwealth.

HAMMOND, J. The defendant contends that the apparatus offered was inadmissible first, because of the "insufficiency of

. . . [the] . . . *ex parte* experiments intended to show the reliability of the machine," and second, because of the failure of the Commonwealth "to show the trustworthiness of said stop watch mechanism, an integral part of the apparatus." In support of the first objection he insists that the evidence of the experiments described in the fifth paragraph of the "agreed statement of facts" was inadmissible and the experiments themselves insufficient because the conditions under which the experiments were performed differed from those under which the experiment in the case in question was performed, the difference being that in the former the apparatus was used to photograph a stationary object, while in the latter the object was moving; and also that in the former the apparatus was used only to ascertain distance, while in the latter it was used to ascertain something more, namely, "speed as shown by both distance and time."

As a rule the question whether evidence of experiments shall be admitted depends largely upon the discretion of the trial judge; and his action in the exercise of this discretion will not be reversed unless plainly wrong. *Field v. Gowdy*, 199 Mass. 568, and cases cited. In this case the result of the experiments did not depend upon the fluctuations of human agencies, nor on conditions whose relations to the result were uncertain, but upon the immutable working of natural laws; and upon the evidence the presiding judge may well have found that such experiments were likely to be more reliable as to the speed of the automobile than the conjectural statement of an eye witness or the interested statement of a chauffeur. We cannot say as matter of law that the evidence would not justify the judge in coming to the conclusion that the experiments would be useful in determining the speed of the car. Indeed it would seem desirable to have some machine whose action being dependent upon the uniform working of the laws of nature would record the speed of a moving object.

Nor is the fact that the experimenter was not an expert fatal to the introduction of the machine. A man may testify to the existence of thunder and lightning and the disastrous results therefrom without being an expert on electricity or electrical phenomenon. For a discussion of the law relating to the admissibility of experiments see among other cases *Baker v. Harrington*, 196 Mass. 339, and cases cited.

The evidence as to the accuracy of the chronometer was admissible and justified the trial judge in submitting that question to a jury. Moreover it was sufficient to warrant a finding by the jury that the chronometer was a correct recorder of time.

It follows that there was no error in admitting the instrument in question, or the evidence as to its construction, or that relating to the experiments.

Exceptions overruled.

PATRICK COSTELLO vs. INHABITANTS OF NORTH EASTON VILLAGE DISTRICT.

Bristol. January 5, 1910. — February 28, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Contract, Validity. Watch District. Improvement District. Fire District. Municipal Corporations, Officers and agents. Quasi Corporations.

No contract involving the incurring of expense can be binding upon either a watch district, established under Gen. Sts. c. 23, § 8, now R. L. c. 31, §§ 8-19, or upon an improvement district, established under St. 1870, c. 332, now R. L. c. 25, § 44, or upon a fire district, established under Gen. Sts. c. 24, § 88, now R. L. c. 32, §§ 49-70, until some provision has been made, by vote at least, to raise and appropriate the money to meet the expense; and therefore, although such a district votes to employ a certain person at a stated salary as a watchman and police officer, and such person accepts the appointment and serves as such officer, he cannot recover for such services if at the time of the vote there was no money in the treasury of the district and no further vote making an appropriation for the officer's salary was passed.

CONTRACT against an incorporated district described below for compensation for services as watchman and police officer from June 18 to October 1, 1908. Writ dated October 3, 1908.

On appeal to the Superior Court, the case was heard by *Stevens, J.*, without a jury, upon an agreed statement of facts.

It appeared from the agreed facts that the defendant was an incorporated district in the town of Easton. It was a watch district and an improvement district by virtue of the general laws in force in 1873, when the district was first established,

and a water district and fire district by virtue of the provisions of St. 1887, c. 169.*

Police officers and watchmen of the district always had been employed by and under the control and superintendence of the prudential committee. The bills for services of the police officers and watchmen always had been presented to the prudential committee to be approved before they could be paid by the treasurer.

At the annual meeting of the district, which was held on April 30, 1908, the district raised and appropriated the sum of \$1,200 for the purpose of employing and paying two police officers and watchmen for the ensuing year under the direction of the prudential committee. The plaintiff had been employed by the district in the capacity of police officer and watchman for many years preceding the annual meeting of 1908. Immediately after the annual meeting the prudential committee organized and employed two police officers and watchmen, each at a salary of \$600 per year, which took up the whole appropriation for the police officers and watchmen for the ensuing year. The plaintiff was not one of the officers employed.

The plaintiff thereupon circulated a petition to have a special district meeting called, and such meeting was called to be held on June 11, 1908, "to see," among other things, "what action the district would take in relation to employing and paying a watchman and police officer for day duty during the ensuing year." At that meeting Article II of the warrant was as follows: "To see what action the district will take in relation to employing and paying a watchman and police officer for day duty during the ensuing year," and Article III read: "To see if the district will authorize the prudential committee to appropriate, borrow or transfer money not less than \$600 for the payment of said watchman and police officer for the ensuing year."

* St. 1887, c. 169 was an act incorporating the North Easton Water Company. By §§ 9-16, the "town of Easton, or the incorporated district therein known as the North Easton Village District" was given the right at any time under certain conditions "to take, by purchase or otherwise, the franchise, corporate property and all the rights and privileges of said corporation," and provision was made regarding the payment for the property thus taken, for the assessment and collection of taxes by the district, for its meetings and regarding the election and powers of its officers.

At that meeting, which was attended by the plaintiff, it was explained by an officer of the district that there was no money in the treasury which could be appropriated for the purpose of paying a watchman and police officer, that no money could be raised by taxation for the ensuing year, inasmuch as it was after the first of May, the time for assessing taxes, and that the district had no right to borrow any money except in anticipation of the taxes raised and appropriated at the annual meeting for the ensuing year. Upon consideration of Article II it thereupon was "voted to employ Patrick Costello as watchman and police officer for the ensuing year, salary \$600." In considering Article III a motion was made to dismiss the article. This motion was defeated, but no other motion was made under this article and the moderator, after asking that some action be taken upon it and waiting for a reasonable time, passed to the next article without objection from anybody, so that no action was taken under Article III.

On June 16, 1908, the plaintiff wrote to the defendant's prudential committee accepting "the position of watchman and police officer for day duty for the ensuing year at a salary of \$600 as voted at" the special meeting of June 11, 1908; and stating, "I shall report for duty on Thursday, June 18, 1908."

In reply the chairman of the prudential committee wrote on June 18, 1908, that "the prudential committee voted not to employ you for the ensuing year at a salary of \$600, as voted at a special district meeting held on June 11, 1908, for the reason that there is no available fund from which to pay you and that the district did not make any provision for paying you."

The plaintiff went on and patrolled the streets of the district in the daytime from June 18, 1908, but the prudential committee did not recognize him as in the employ of the district, and exercised no control or superintendence over him.

The judge found for the plaintiff in the sum of \$182.14, and the defendant appealed.

The case was submitted on briefs.

D. J. O'Connell, for the defendant.

F. S. Hall & C. C. Hagerty, for the plaintiff.

HAMMOND, J. The defendant was a watch district and improvement district by virtue of the general laws in force in 1873,

when the district was first established, and a water and fire district by virtue of the provisions of St. 1887, c. 169. The defendant contends that the vote of June 11, 1908, was of no force and effect; and one of the grounds upon which the contention is based is that there was no appropriation out of which the plaintiff could be paid.

A watch district is established "for the protection of property against fire, thieves and robbers, and for keeping the streets quiet in the night time." R. L. c. 31, § 8. Its officers consist of a clerk and a prudential committee of not less than three nor more than five persons. §§ 1, 12. Its manner of working is set forth in § 15 as follows: "The district may, at meetings called for the purpose, vote to raise money for the payment of watchmen and for other necessary expenses. The prudential committee shall have the superintendence and control of the watchmen, have charge of and be responsible for the property employed, have the custody and management of the money raised, expend the same for the purposes specified in the votes of the district, be accountable to the district for the money received by them and be liable to a suit for such money or other property of the district in the name of the inhabitants thereof." The clerk certifies to the assessors of the town in which the district lies the amount of money which the district has voted to raise, and the amount is assessed by the assessors of the town and the tax collected as in the case of town taxes.

It is a *quasi* corporation to which certain powers are granted, but upon which no obligation rests to exercise those powers. After organization it may decline or neglect to take any steps to protect property or to keep the streets quiet in the night time, indeed may cease utterly to act under any of the powers conferred upon it, and may leave these matters to be looked after by the town. It acts voluntarily and not by compulsion. When it chooses to act it must keep within the lines prescribed by the statute. It has no power to borrow money, not even in anticipation of the payment of taxes. It may raise and appropriate money and may spend it for the purposes for which the district was organized, but by necessary implication its power to spend must be limited by its appropriation. The powers of a district like the defendant are very restricted, and are to be exercised in

strict compliance with the authority given by statute. We think this statute by fair implication requires that before any contract can be binding on the district there must be some provision made, by vote at least, to raise and appropriate the money to meet the expense. In these respects its situation is entirely different under our statutory law from that of a town upon which duties are imposed and to whom corresponding powers are granted in order that those duties may be properly performed.

As an improvement district it is established "for the purpose of erecting and maintaining street lamps, establishing and maintaining libraries, building and maintaining sidewalks or for employing and paying watchmen and police officers." R. L. c. 25, § 44. Here, as in the case of a watch district, the duties are not compulsory. The district may for instance build and maintain sidewalks, but there rests upon it no duty in law to maintain a sidewalk for any longer time or to any greater extent than it sees fit. And its power as an improvement society to raise and appropriate money and to make contracts is, *mutatis mutandis*, the same in substance as its power as a watch district.

As a fire district the defendant may "incur debts for temporary loans in anticipation of the taxes of the municipal year in which such debts are incurred and of the receipts from other sources due in such year, and expressly made payable, by vote of the district, from such taxes and receipts." R. L. c. 32, § 60.

The defendant's power as a fire district or as a water district under St. 1887, c. 169, adds nothing to its power to contract for watchmen and policemen.

At the annual meeting in April, 1908, the district voted to raise and appropriate \$1,200 for the purpose of employing and paying two watchmen and police officers to be under the control of the prudential committee. Immediately after the meeting the committee employed two officers, each at a salary of \$600 a year, "which took up the whole appropriation for the police officers and watchmen for the ensuing year." Therefore when the June meeting was held the appropriation for this purpose was exhausted. Nevertheless the vote to employ the plaintiff was passed and no vote to raise and appropriate the money necessary for the payment of his salary was passed, although the warrant was read to the meeting for action thereon.

The only effect of such a vote to employ the plaintiff was to contract a debt in excess of the money raised and appropriated. It was for that reason alone invalid. It never has been ratified by way of a vote to raise and appropriate the money or in any other way.

It becomes unnecessary to consider the other grounds of defense.

Judgment for the defendant.

JOHN E. PHILLIPS vs. J. H. LOCKEY PIANO CASE COMPANY.
JOHN PHILLIPS vs. SAME.

Worcester. January 10, 1910. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability. Evidence, Opinion: experts, Admissions, In rebuttal Practice, Civil, Conduct of trial.

Where, at the trial of an action against the proprietor of a woodworking establishment by an employee therein to recover for injuries alleged to have been caused by a defective buzz planer, there was evidence tending to show that there was a vibration and uneven motion on the part of the machine, that boards which went through it came out, not well planed, but rough like a washboard, and that such facts would indicate that something was loose about the fastening of the cylinder of the machine, which condition would cause a board being planed to draw the operator's hand in toward the knives, and that the plaintiff was injured by having his hand drawn in by a board which he was pushing into the planer, it is proper for the presiding judge to refuse a request for a ruling that "the mere fact that there was vibration or uneven motion in the machine furnishes no evidence of a defect in the machine."

The mere fact, that the proprietor of a woodworking establishment caused a defective buzz planer to be repaired by a reputable maker, does not exempt him from liability for injury to an employee which occurred during a month after the repairs were made.

Where, at the trial of an action against the proprietor of a woodworking establishment by an employee therein, who was injured by having his hand drawn into a buzz planer, there was evidence that just before the accident the planer "jarred and would not allow the cutter to cut smoothly, making a washboard effect," the following questions were held to be proper to put to one who was an acknowledged expert in woodworking and woodworking machinery, and the answers were held to be responsive and admissible: "Q. Assume that a person is at work operating a buzz planer and planing stock two inches wide and five eighths of an inch thick, and that said stock when planed appears to be rough and of a washboard effect as testified to, what in your opinion does that indicate

to be the matter with the machine, if anything? A. It would indicate something was loose about the fastening of the cylinder of the machine. — Q. What in your opinion would be the effect upon a board passing over the knives of the planer with a loose cylinder? A. In my opinion the board would ride upon and jump in cross-grain or anything, and if a man's hand was anywhere near, it would pull his hand in towards the knives according chiefly to the way he had hold of it."

At the trial of an action against the proprietor of a woodworking establishment by an employee therein to recover for injuries alleged to have been due to a defective condition of a buzz planer, the plaintiff's evidence in chief had tended to show that the machine was defective as alleged, and one who had acted as superintendent of the defendant had testified as part of the defendant's case that at the time of the accident to the plaintiff the machine was not out of repair. In rebuttal, the plaintiff was allowed to call a witness who testified that, after the accident, the defendant's superintendent, who previously had testified, had stated, "I will see that no one else runs that machine but myself until it is fixed." Held, that, while the testimony was not competent to show an admission which was binding upon the defendant, it was admissible as tending to contradict the previous testimony of the superintendent.

TWO ACTIONS OF TORT, the first for personal injuries received while at work upon a buzz planer in the defendant's factory, the declaration containing counts at common law and under R. L. c. 106, § 71, alleging that the plaintiff was not properly instructed or warned as to the dangers of his employment, and that the buzz planer was defective. The second action was by the father of the plaintiff in the first (who hereinafter will be called the plaintiff) and sought to recover for loss of his son's services and for the expenses incurred by reason of his injuries. Writs dated January 10, 1907.

The cases were tried together before *Raymond, J.* The plaintiff's evidence tended to show that at the time of the accident he was between twenty and twenty-one years of age and had been working for the defendant a year; that he had been working upon a buzz planer about two weeks; that the buzz planer upon which he worked had a guard or spring which prevented his hand from coming into contact with the knives; that he was working under the direction of one Rugg; that on the morning of the accident a piece of board which he had been planing nicked out in the end and he showed it to Rugg, who shut the power off and came over and took the guard off and told him to go on with the work; that he took another piece of wood and, when he had run it about four inches over the knives, the board jumped and threw the stock back, throwing his hand

upon the knives; that when the guard was removed, no warning was given to him that there was any danger of the board jumping and throwing his hand upon the knives and that he had no knowledge that there was anything the matter with the machine.

One Rice, a fellow workman with the plaintiff, testified that the front of the cylinder of the planer had been repaired by the makers during the month preceding that of the accident; that a few days before the accident Rugg examined the machine, found the casting cracked "just about where the set screw goes in," and, to steady it, "put a hand screw on the back box"; that the witness used the planer the afternoon before the plaintiff was injured and at that time it jarred and would not allow the cutter to cut smoothly, making a washboard effect.

Rugg, testifying for the defendant, stated that the planer was in good repair just before the accident.

In rebuttal the plaintiff called his father, who, subject to an exception by the defendant, was allowed to testify that, in a conversation with Rugg after the accident, Rugg said, "I will see that no one else runs that machine but myself until it is fixed."

The presiding judge refused to make the rulings which are quoted in the opinion, as well as others, the exceptions to his refusal of which were waived as there stated. Exceptions relating to matters of evidence, other than that stated above, also are described in the opinion.

There were verdicts for the plaintiffs; and the defendant alleged exceptions.

The case was submitted on briefs.

C. C. Milton & D. F. Gay, for the defendant.

D. I. Walsh, T. L. Walsh & C. B. O'Toole, for the plaintiffs.

MORTON, J. All of the defendant's requests except those numbered 9, 10 and 11 have been waived by it. Requests 9, 10 and 11 are as follows: "9. The mere fact that there was vibration or uneven motion in the machine furnishes no evidence of a defect in the machine. 10. If the machine was repaired by a reputable maker and the repaired part installed on the machine the defendant was justified in using the machine so repaired and was not negligent in so using it. 11. There is no evidence of defect in the machine except as testified to by Rice

that no repair had been made on the cracked casting, and unless the jury believe the testimony of Rice the plaintiff cannot recover." We think that the instructions thus requested were rightly refused.

Whether the vibration or uneven motion, if there was any, could be regarded as evidence of a defect, depended upon what the jury might find as to the nature or extent of it. The jury might have found it to be such that the only reasonable explanation of it, or at any rate the more reasonable explanation of it, was that it was due to a defect in the machine, in which case the presence of the vibration or uneven motion would have been evidence of a defect in the machine. It would have been error therefore, to have given the ninth instruction requested.

The fact that the defendant had got a reputable maker to repair the machine was admissible in evidence on the question of the defendant's due care or negligence in continuing to use the machine. But it could not have been ruled as matter of law that the defendant could not be found to have been negligent in using the machine after it was repaired. The repairs might not have been properly made notwithstanding the work was done by a reputable maker, and the machine might still have continued to be defective and unsafe for use. The tenth request was therefore properly refused.

The eleventh request could not have been given as drawn, since, even if the jury disbelieved Rice, they might still have found that the plaintiff was entitled to recover on the ground that he was directed by the defendant's foreman to go on with his work after the guard or spring had been removed from the machine, without any warning or instructions being given him as to the danger. The request as drawn asked the presiding judge to instruct the jury, in substance, that the plaintiff could not recover unless they believed, what Rice had testified to, that there had been no repair of the cracked casting, and was plainly too broad.

The remaining exceptions relate to matters of evidence. One Farwell was called as an expert by the plaintiff. No objection was made to his qualifications as an expert. On direct examination he was asked: "Assume that a person is at work operating a buzz planer and planing stock two inches wide and five

eighths inches thick, and that said stock when planed appears to be rough and of a washboard effect as testified to, what in your opinion does that indicate to be the matter with the machine, if anything?" and he answered, "It would indicate something was loose about the fastening of the cylinder of the machine." We think that the question and answer were both plainly competent. One objection urged is, in effect, that the question was not sufficiently comprehensive. But however much that might affect the value of the answer it did not make the question itself incompetent. Another objection is that it called for the opinion of the witness upon the effect of evidence. We do not think so. The words "as testified to" referred simply to what had been previously described in the question as a rough and washboard effect. We think that the subsequent question to the same witness and his answer were also clearly competent. The question was a proper one for an expert, and the answer was responsive.* The testimony in rebuttal that was objected to was rightly admitted. It tended to contradict the defendant's witness in regard to a material matter, and was admissible for that purpose, though incompetent as an admission by the defendant's agent.

Exceptions overruled.

* The question and answer were: "Q. What in your opinion would be the effect upon a board passing over the knives of the planer with a loose cylinder? A. In my opinion the board would ride upon and jump in cross-grain or anything, and if a man's hand was anywhere near it would pull his hand in towards the knives according chiefly to the way he had hold of it."

ROBERT E. MAGUIRE vs. PAN-AMERICAN AMUSEMENT
COMPANY & others.

Suffolk. January 10, 1910. — February 23, 1910.

Present : KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Replevin, Bond. *Damages*, In action on replevin bond. *Practice*, *Civil*, *Costs*. *Interest*. *Estoppel*. *Evidence*, *Presumptions* and *burden of proof*.

In an action upon a replevin bond, the condition in which is that the obligor "shall prosecute said action of replevin to final judgment, and shall pay such damages and costs as the said [defendant in replevin] shall recover against [the obligor], and shall also return the property replevied, in case such shall be the final judgment," there can be no recovery for the expenses, including counsel fees, which the defendant in the replevin suit was obliged to incur in defense of that suit and in the prosecution of the suit upon the bond, both because the bond includes no provision for the payment of such expenses, and because the taxable costs which are recovered in such cases are in the contemplation of the law a full indemnity for all the expenses incurred in defense and in prosecution.

In an action upon a replevin bond, the plaintiff cannot recover interest upon the value of the property detained for a period previous to the judgment in the replevin suit.

All the damages up to the time of judgment, which the defendant in a replevin suit in case he is successful may recover for the taking and detention of the replevied property, including interest upon the value of the property, if such interest is taken to be the damages for the detention, and also including the interest at the rate of twelve per cent allowed by R. L. c. 190, § 11, in case at the time the goods were replevied they were under attachment and the service of an execution is thereby delayed, should be assessed in the replevin suit, and if such damages are not included in the judgment in the replevin suit, they cannot be recovered at all.

In an action upon a replevin bond, the defendant, who was the plaintiff in the replevin suit, is not estopped to prove that the value of the goods replevied was less than \$5,000 by the facts that the replevin writ contained an order that the officer should deliver the replevied property to the plaintiff named in the writ if the plaintiff "shall give bond . . . in the sum of \$10,000, being twice the value of" the property replevied, and the fact that such bond for \$10,000 was given and accepted by the officer who served the writ and was delivered to the defendant, such recitals being evidence but not conclusive evidence.

In an action upon a replevin bond where it appears that the defendant, who was the plaintiff in the replevin suit, has failed to return the property which he seized by virtue of the replevin writ and which the judgment in the replevin suit directed him to return, the plaintiff is entitled to recover, besides the amounts awarded to him as damages by the judgment in the replevin suit and interest thereon at six per cent from the date of such judgment, the fair market value of the property in as good order and condition as it was at the date of the final judgment in the replevin suit, plus interest on such amount at the rate of six per cent.

CONTRACT upon a replevin bond. Writ dated May 4, 1906.

The case was tried before *Brown, J.*, when the following facts appeared.

The plaintiff, Robert E. Maguire, is a deputy sheriff of the county of Suffolk. On September 9, 1902, by virtue of a writ in an action of one Charles Messenger against the Lederer Amusement Company, he attached certain personal property consisting of scenery, costumes, and theatrical properties then being used in the production of a play at the Colonial Theatre in Boston. On September 11, 1902, the property was taken out of Maguire's hands by virtue of a replevin writ issuing from the Circuit Court of the United States for the First Circuit, District of Massachusetts, in which the Pan-American Amusement Company was plaintiff and Maguire was defendant. This writ, after directing the seizure of the goods and naming the parties, ordered the United States marshal or his deputy to "summon the said Robert E. Maguire . . . to answer unto the said Pan-American Amusement Company in a plea of replevin, for that the said Robert E. Maguire, on the ninth day of September, at Boston, unlawfully, and without any justifiable cause, took the goods and chattels of the said Pan-American Amusement Company as aforesaid, and them unlawfully detained to this day, to the damage of the said Pan-American Amusement Company, as it says, the sum of twenty thousand dollars: Provided it, the said Pan-American Amusement Company, shall give bond to the said Robert E. Maguire with sufficient surety or sureties, in the sum of ten thousand dollars, being twice the value of the said goods and chattels, to prosecute the said replevin to final judgment, and to pay such damages and costs as the said Robert E. Maguire shall recover against him, and also to return and restore the same goods and chattels, in like good order and condition, as when taken, in case such shall be the final judgment."

Annexed to the writ was the following certificate:

"Boston, September 11, 1902. We, the subscribers, being first duly sworn, have examined the within-named property and appraised the value thereof at four thousand dollars (\$4000). Allen M. Sheehan, J. Lod Sutherland, Julian B. Hart."

The officer's return upon the writ was as follows:

"United States of America, Massachusetts District, ss. Boston, September 11, 1902. By virtue of this writ, I, this day, appointed as appraisers three disinterested and discreet men, to wit, Allen M. Sheehan, J. L. Sutherland, and Julian B. Hart, who were duly sworn by me to the faithful discharge of their duties, and who appraised the within named articles, to wit, [describing the property] to the value of four thousand (4000) dollars, as appears by their certificate hereto annexed. I also took from the within-named Pan-American Amusement Company, plaintiff, a bond to the within-named Robert E. Maguire, defendant, with sufficient sureties approved by me in double the value of said property so ascertained, with condition to prosecute the replevin to final judgment, and to pay such damages and costs as the said Robert E. Maguire shall recover against him, and also to return the said property in case such shall be the final judgment, which bond I herewith return. And thereupon I replevied the above-described property and delivered the same to the said Pan-American Amusement Company, plaintiff, and summoned the said Robert E. Maguire to appear at court as within directed by giving to him in hand a true and attested copy of this writ. F. X. MacDonald, Deputy U. S. Marshal."

The bond which was given to the deputy marshal, and which is the basis of this suit, was as follows :

"Know all men by these presents that we the Pan-American Amusement Company of City, County and State of New York as principal, and Isaac B. Rich and Thomas B. Lothian both of Boston in the County of Suffolk and Commonwealth of Massachusetts as sureties, are holden and stand firmly bound unto Robert E. Maguire of Boston in the County of Suffolk and Commonwealth of Massachusetts in the sum of Ten Thousand dollars, to the payment of which to the said Robert E. Maguire or his executors, administrators, or assigns, we hereby jointly and severally bind ourselves, our heirs, executors, and administrators.

"The condition of this obligation is such that whereas the above bounden Pan-American Amusement Company, on the tenth day of September sued out a writ of replevin returnable before the United States Circuit Court to be holden at Boston within and for the District of Massachusetts on the fifteenth day of October next.

"Now if the above bounden Pan-American Amusement Company shall prosecute said action of replevin to final judgment, and shall pay such damages and costs as the said Robert E. Maguire shall recover against it, and shall also return the property replevied, in case such shall be the final judgment, then this obligation shall be void, otherwise it shall be and remain in full force and virtue.

"In witness whereof we hereunto set our hands and seals this tenth day of September, A. D., 1902." Signatures and seals and the approval of the sureties by the deputy marshal were appended.

The action of *Messenger v. Lederer Amusement Company* was removed from the Superior Court for the county of Suffolk to the Circuit Court of the United States for the First Circuit, District of Massachusetts, where it was tried and the plaintiff recovered a judgment on November 10, 1903, for \$6,188.46, debt or damage, and \$59.56, costs.

On November 17, 1904, a verdict was rendered for Maguire in the replevin suit, and the jury assessed his damages in the sum of \$1. The Circuit Court of Appeals affirmed the rulings of the Circuit Court, and on January 18, 1906, final judgment was entered in the Circuit Court against the Pan-American Amusement Company for the return of all the property replevied, for \$1.05 as damages, and for \$180.20 as costs of suit. The execution having been in no part satisfied, this action was brought upon the bond.

At the close of the evidence, after refusing to make the rulings described in the opinion, the presiding judge ordered a verdict for the penal sum of the bond, namely, \$10,000, and that damages be assessed in the sum of \$6,461.50, which sum was made up as follows: \$5,000 for the value of goods; \$1,279.25 interest; and \$182.25, the amount of damages and costs for which execution issued in the original replevin suit. Both the plaintiff and the defendants alleged exceptions.

T. J. Barry, (*A. E. Burr* with him,) for the defendants.

J. P. Russell, (*F. M. Whitman* with him,) for the plaintiff.

SHELDON, J. 1. The plaintiff's first exception is to the refusal of the judge to allow him to show what expenses he had been obliged to incur in the defense of the replevin suit, including counsel fees, and also in the present action on the bond.

His contention is that he is entitled to these sums as a part of the expenditures which he has been obliged to make in order to get back his property or its value. *Stern v. Knoulton*, 184 Mass. 29. *Berry v. Ingalls*, 199 Mass. 77. But to this contention there are two sufficient answers.

In the first place, the condition of the bond which constitutes the agreement upon which the plaintiff must rely, was simply that the principal defendant should pay whatever damages and costs this plaintiff should recover against it, and return the property replevied if such should be the final judgment. That is the limit of the defendant's obligation. *Swift v. Barnes*, 16 Pick. 194. *Leighton v. Brown*, 98 Mass. 515. In the second place, the taxable costs which the prevailing party recovers in each case are in the contemplation of the law a full indemnity for all the expenses incurred in his defense or prosecution. *McIntire v. Mower*, 204 Mass. 233, and cases cited. *Barnard v. Poor*, 21 Pick. 378. *Henry v. Davis*, 123 Mass. 345. We have never followed the Illinois cases in which, under the prescribed form of replevin bonds, reasonable counsel fees have been allowed to a successful defendant in replevin. *Gilbert v. Sprague*, 196 Ill. 444, 453. *Harts v. Wendell*, 26 Ill. App. 274. *Dalby v. Campbell*, 26 Ill. App. 502. This case does not resemble *Berry v. Ingalls*, 199 Mass. 77; and the defendants were under no obligation, by contract or otherwise, to indemnify the plaintiff for whatever expense was caused to him, as in *Pond v. Harris*, 113 Mass. 114; *New Haven & Northampton Co. v. Hayden*, 117 Mass. 433; *Westfield v. Mayo*, 122 Mass. 100; *Faneuil Hall Ins. Co. v. Liverpool & London & Globe Ins. Co.* 153 Mass. 68; *Boston & Albany Railroad v. Charlton*, 161 Mass. 32; *Wheeler v. Hanson*, 161 Mass. 370; and *Consolidated Hand-Method Lasting Machine Co. v. Bradley*, 171 Mass. 127, 133.

This exception cannot be sustained.

2. The plaintiff claimed interest on the value of the property from the time that it was taken on the replevin writ; but the judge ruled that he could recover interest only from the date of the verdict in the replevin suit. This ruling was too favorable to the plaintiff, and so he cannot complain of it. The damages for the taking and detention of the property, to the time of the judgment in the replevin suit, should be assessed in that suit;

and this principle includes interest upon the value of the property, if that is taken to be the damages for its detention. If and so far as these damages are not recovered in the replevin suit, then in our practice they cannot be recovered at all. *Stevens v. Tuite*, 104 Mass. 328. As was said in that case (p. 336), if the principal defendant had immediately upon the entry of final judgment in the replevin suit paid the amount of the damages and costs for which that judgment was rendered, and restored all the replevied property in the same condition as when taken, there would have been no breach of the bond. It is for the failure to do this that the plaintiff is entitled to recover; and it follows that he can have interest alike on the damages and costs recovered and on the value of the property only from the date of that judgment. *Swift v. Barnes*, 16 Pick. 194. *Leighton v. Brown*, 98 Mass. 515. This corresponds to the measure of damages in a suit on a bail bond. *Heustis v. Rivers*, 103 Mass. 398. We never have allowed a defendant in replevin to elect between having these damages assessed in the original suit and having them all finally determined in a suit on the replevin bond, as seems to have been done in Maine. *Washington Ice Co. v. Webster*, 62 Maine, 341. *Thomas v. Spofford*, 46 Maine, 408, 410.

But the property replevied was under attachment, and was held by the present plaintiff as an attaching officer. The statute provides that "if the goods when replevied had been taken on execution, or if they had been attached and judgment is afterward rendered for the attaching creditor, and if in either case the service of the execution is delayed by reason of the replevin, the damages to be assessed for the defendant upon a judgment for a return shall be at the rate of not less than twelve per cent a year on the value of the goods for the time during which the service of the execution was so delayed." R. L. c. 190, § 11. The attaching creditor here recovered judgment pending the action of replevin; the service of the execution was delayed by the replevin, and it has remained wholly unsatisfied. The plaintiff claims that he is entitled to interest at this higher rate from the date of the execution in the attachment suit to the date of the verdict in this action, and has excepted to the ruling of the judge allowing him interest at the rate only of six per cent per year. But this increased rate of interest is allowed only by way of damages

for the detention of the property whereon the execution might have been levied, and the allowance by the very language of the statute is to be made upon the "judgment for a return." It follows that recovery for this item of damages can be had only in the action of replevin itself. *Stevens v. Tuite*, 104 Mass, 328. *Parker v. Simonds*, 8 Met. 205. So far as *Huggeford v. Ford*, 11 Pick. 223, lays down a different rule, it cannot now be followed.

Both of the plaintiff's exceptions must be overruled.

3. The trial judge ruled that the defendants could not be allowed to show that the value of the property replevied was less than \$5,000. They made several offers of proof to show what they claimed to be the value of the property, all of which were excluded. The defendants have excepted to these rulings.

It was said in some of our earlier cases that the plaintiff's averment in a writ of replevin of the value of the property which he seeks to replevy, or the recital of such value in the replevin bond, is conclusive upon him and upon his sureties in that bond, and that they cannot, when sued upon the bond after a breach of its condition, diminish the amount of their liability by proof that the property was in fact of a smaller value. *Huggeford v. Ford*, 11 Pick. 223. *Swift v. Barnes*, 16 Pick. 194, 196. *Parker v. Simonds*, 8 Met. 205, 213. *Leighton v. Brown*, 98 Mass. 515, 516. But the rule was not uniformly applied. In *Pomeroy v. Trimper*, 8 Allen, 398, the court, after pointing out that a plaintiff in replevin need not make any averment of the value of the property, (*Blake v. Darling*, 116 Mass. 300,) said that such an averment, if made, was admissible against him on the question of value, but was not conclusive against him nor in any way binding on the defendant. In *Barnes v. Bartlett*, 15 Pick. 71, 79, it was said that such an averment was *prima facie* evidence against a plaintiff in replevin. But it does not settle the jurisdiction of the court over the action. *King v. Davey*, 11 Cush. 218. In *Gordon v. Jenney*, 16 Mass. 465, in which the court refused to allow damages for depreciation in value of the property to a plaintiff who has kept it to abide the final judgment, this was put on the ground that he could have sold the property in such a manner as to ascertain its value, and that he would be answerable on his bond only for that real value.

But we are of opinion that the rule has been finally settled

in this Commonwealth by the decision in *Wright v. Quirk*, 105 Mass. 44. It was held in that case that the sum named in a replevin bond as the value of the property is competent but not conclusive evidence of that value against the obligors in an action on the bond. Either party has a right to have the value determined by a jury, and the testimony of any witness of competent knowledge is admissible as evidence of such value; and because the judge at the trial had excluded such testimony and refused to leave the question of the value to the jury, but had ruled that the defendants, the obligors of the bond, were bound by the recital of value therein contained, a new trial was ordered. That case is decisive of this question. So it was said in *Litchman v. Potter*, 116 Mass. 371, 373: "It is not necessary in a replevin writ to allege the value of the goods to be replevied. *Pomeroy v. Trimmer*, 8 Allen, 398. *Blake v. Darling*, 116 Mass. 300. If alleged, it may under some circumstances be admissible against the plaintiff as evidence of value; *Clap v. Guild*, 8 Mass. 158; *Barnes v. Bartlett*, 15 Pick. 71; but is not conclusive evidence even on the question of jurisdiction."

We are of opinion that the judge erred in ruling that the plaintiff was entitled as matter of law against the defendants to have the property valued at \$5,000, and that he should have ruled that the language of the bond afforded no more than *prima facie* evidence that the property was of that value.

We have been referred by the industry of counsel to a great many decisions upon this question in other States. As we find the rule to have been settled in this Commonwealth, we do not deem it necessary to advert to those decisions, although we have examined them all. They are not in accord, and it would be difficult to say which of the two rules contended for before us is supported outside of this Commonwealth by the greater weight of authority. But we are of opinion that as a matter of sound reason the better doctrine is that to which we adhere. If a plaintiff in replevin chooses to make a statement of the value of the property in his writ or in his bond, undoubtedly it should be regarded as an admission by him, and should afford evidence of that value against him and those who, like his sureties, are in privity with him. But it is against all the analogies of the law to treat the mere admission of a party, not essential, as we have

seen that this is not essential, to the institution or the prosecution of his proceedings, and not acted upon or intended to be in any way acted upon by the opposite party, as an estoppel. *Athol Savings Bank v. Bennett*, 203 Mass. 480, 485. The averment may have been made without seeing the property or knowing anything of the condition into which it has been put by the defendant in replevin. It is customary in our practice to prepare the bond in advance of the service of the writ and before an appraisal of the property has been made under R. L. c. 190, §§ 3 and 9. If this is done, the plaintiff will naturally make the penalty of the bond large enough to cover whatever appraisal may in the future be made. Under such circumstances, the fact that the bond is required to be in double the value of the property scarcely justifies the inference that the plaintiff and his sureties are estopped to deny that the value of the property is at least half of the penalty of the bond, especially since we have decided that no harm is done to any party by making that penalty needlessly large. *Clap v. Guild*, 8 Mass. 153. But in the case at bar the writ contained no allegation of the value of the property; the bond contains no such recital; the appraisal amounted only to \$4,000; and the statement in the return of the officer that he took and returned a bond in double the value of the property replevied could not constitute a solemn averment such as to bind and estop the obligors of the bond, even under the most rigid of the decisions which have held those obligors bound by an averment of that value. Even if the plaintiff in replevin had made in his writ such an express averment, we think that, in the language of Smith, J., in *Briggs v. Wiswell*, 56 N. H. 319, 322, "it would be unreasonable to hold that he should be precluded from laying any evidence before the jury upon the question of value, because he may have been led, for reasons that turn out not to be well grounded, to set the value in his writ higher than it actually is." *A fortiori* is this so, where, as here, no such express averment is made, but it is a matter of inference to be drawn by coupling the language of the bond with that of the officer in his return, although the obligors had absolutely no control over the language to be used by the officer.

Accordingly the defendant's exceptions to this ruling must be sustained. It is not necessary to deal with their offers of proof

in detail. But it was their duty, upon the rendition of the judgment for a return, to see that the property was restored to the plaintiff in like good order and condition as when taken. *Citizens' National Bank v. Oldham*, 136 Mass. 515, 517. The plaintiff is entitled to the fair market value of the property in that order and condition as of the time when it should have been delivered to him, that is, on the date of the final judgment in the replevin suit. *Swift v. Barnes*, 16 Pick. 194. *Leighton v. Brown*, 98 Mass. 515. *Stevens v. Tuite*, 104 Mass. 328. The damages should be assessed upon this basis.

4. The defendants have waived their exception to the refusal of the judge to rule that the plaintiff could not maintain this action, or could at any rate recover no more than nominal damages, by reason of the removal of the attachment suit to the United States court. We do not see how that exception could have been sustained. *Barney v. Globe Bank*, 5 Blatchf. 107. *Dennistoun v. Draper*, 5 Blatchf. 336. *Schott v. Youree*, 41 Ill. App. 476, and 142 Ill. 233. *Petrie v. Fisher*, 43 Ill. 442. *Tedrick v. Wells*, 59 Ill. App. 657.

The plaintiff's exceptions must be overruled, and the defendants' exceptions must be sustained; and it is

So ordered.

**FRANK H. INGALLS vs. LEXINGTON AND BOSTON STREET
RAILWAY COMPANY.**

Middlesex. January 10, 1910. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, In use of highway, Imputed.

At the trial of an action against a street railway company by one who, while being driven in an express wagon, was injured in a collision between the wagon and a car of the defendant, it appeared that the plaintiff had had an experience of two years as an expressman in the neighborhood of the accident, which ended two years before the accident, that, having business with one who was the driver and a part owner of the express wagon, he had been invited to sit with him upon the wagon seat, that the plaintiff knew the driver to be experienced and familiar with the locality, that the wagon was drawn by two horses and was heavily loaded with merchandise piled high above the heads of the occupants, that, at about half past seven o'clock in the evening of the last day of October, the driver drove the wagon thus loaded on a driveway at a descending grade to the street

and at right angles across the single track of a street railway to the farther side of the street, this course being adopted in order to avoid a sharp turn with the heavy load, that the driver then proceeded for about three hundred feet on the left hand side of the street, and was turning to cross to the right hand side when the plaintiff noticed the approaching street car, that by the driver's conduct it was indicated to the plaintiff that the driver at the same time observed the car, that the driver urged the horses with the reins, having no whip, but that the car, which some of the evidence tended to show was approaching at the rate of thirty-five miles an hour on a down grade, struck the wagon before it could be got off the track. *Held*, that, while perhaps it could be said that there was no evidence of due care on the part of the driver, which point was not decided, there was evidence for the jury on the question of the plaintiff's due care, he being justified in trusting something to the care and experience of the driver and not being called upon to warn the driver, whose guest he was, of dangers of which the driver seemed to know.

TORT for personal injuries sustained in a collision of an electric street car of the defendant and an express wagon in which the plaintiff was being driven. Writ dated December 31, 1902.

The case was tried before *Harris*, J. The evidence as to the relations between the plaintiff and the driver of the express wagon tended to show that about two years previous to the accident the plaintiff had been engaged in the express business for about two years, that at that time he sold out his express business to Alexander Dwyer and Nelson S. Dwyer, and, after the sale, remained in Lexington about six months, and then went to Sheffield, Vermont. Shortly before the accident he came from Vermont to do some business with one of the Dwyers, and met Alexander Dwyer in Boston and they rode out on the train together. On arriving at Lexington he proceeded to the stable of the Dwyers and was driven by Alexander about two miles to Holbrook's store, which is the store referred to in the opinion, and waited there until Nelson S. Dwyer came out from Boston, driving an express wagon drawn by two horses and owned by the Dwyer Brothers, loaded with goods to be delivered at various points in Lexington and East Lexington. A small portion of the goods was taken off at Holbrook's store, and then the plaintiff and Alexander Dwyer got upon the loaded wagon. Alexander Dwyer took the reins and drove away from the store with the plaintiff sitting upon the seat of the wagon beside him, Dwyer on the right hand of the seat and the plaintiff on the left. Dwyer continued driving the wagon until the collision occurred.

Other facts are stated in the opinion.

At the close of the evidence, the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

H. N. Allin, for the plaintiff.

C. A. Hight, (*T. B. Hughes* with him,) for the defendant.

KNOWLTON, C. J. This is an action to recover for injuries received by the plaintiff from a collision of the defendant's street railway car with a wagon on which he was riding. There was evidence of negligence on the part of the defendant's motorman in running the car at an excessive rate of speed, and perhaps in other particulars, leaving, as the only issue now before the court, the question whether there was evidence that the plaintiff was in the exercise of due care. The accident happened at half past seven o'clock in the evening of October 31, while the plaintiff was riding, by the invitation or with the consent of the driver, upon a large express wagon, drawn by two horses and heavily loaded with merchandise high above the heads of its occupants. The plaintiff's relations to the driver were such that the driver's negligence cannot be imputed to him. *Shultz v. Old Colony Street Railway*, 193 Mass. 309. The railway was but a single track nearly in the centre of the street. The express wagon was driven out from a store on the easterly side of the street, on a descending grade to the westward, at right angles to the street and across the track to the westerly side, because that was a safer and easier way to go with the high load than to turn sharply to the right in coming from the store. The driver proceeded for about three hundred feet northward, on the left hand side of the track, and then turned to the right, and was going with the wheels on the right hand side of the wagon and with the off horse between the rails, and the wheels on the left hand side outside of the track, westerly of the westerly rail. After proceeding a short distance in this course, the defendant's car was seen coming from the north on a descending grade, and the driver turned diagonally to the right to get the wagon off the track; but the forward wheel on the left hand side of the wagon was struck by the car, and the plaintiff was injured. The driver, when he saw the car, urged his horses by striking them with the rein, having no whip. The plaintiff was familiar with the place, but he said nothing to the driver, until

the car was very near them, when he said, "My God, Dwyer, he is going to hit us." The driver, too, was entirely familiar with the neighborhood. There was evidence that the car was going at the rate of thirty to thirty-five miles an hour, although this was contradicted.

It well might have been found that the driver was not in the exercise of due care. Perhaps it could be said that there was no evidence of his due care, although this we do not determine. However this may be, the position of the plaintiff was very different. He was not primarily responsible for the driving of the horses and the position of the team in the street. He was a mere invited guest of the driver. He could well trust something to the care and experience of the driver and his supposed qualifications for his position. Indeed, occupants of wagons and carriages are often so situated as to be obliged to trust everything to the driver of the vehicle in which they are riding. It would have been an impertinence for the plaintiff to volunteer suggestions to the driver as to the method of driving, in the absence of some important reason for so doing. While it was his duty to exercise due care for his own safety, and while he should have warned the driver of any danger that he observed, if he thought the driver was ignorant of it, and should have done anything else that was reasonably necessary for his own protection, he was not called upon to inform the driver of dangers which the driver seemed to know. He testified that when he first saw the approaching car the driver indicated by his conduct that he also saw it and was attempting to get out of the way of it. We are of opinion that, upon the whole evidence, it was a question for the jury whether the plaintiff failed to do anything for his protection that the exercise of due care required him to do. *Peabody v. Haverhill, Georgetown & Danvers Street Railway*, 200 Mass. 277. *Chadbourn v. Springfield Street Railway*, 199 Mass. 574. *Tennien v. Chase*, 201 Mass. 497. *Miller v. Boston & Northern Street Railway*, 197 Mass. 535.

Exceptions sustained.

PIERRE LAPRADE vs. FITCHBURG AND LEOMINSTER STREET
RAILWAY COMPANY.

Worcester. January 10, 1910. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Evidence, Extrinsic affecting writings. Contract.

At the trial of an action of contract where the declaration alleged that the defendant, in consideration of the plaintiff's forbearance to sue him for injuries resulting from alleged negligence on the part of the defendant, promised to pay the plaintiff \$100 and certain wages until he had fully recovered, but, after paying the wages for a time, refused to do so further, evidence of the plaintiff tended to show that an oral agreement to such effect was made between the plaintiff and an agent of the defendant, that then the defendant's agent drew up what he said was a memorandum of the agreement which, after the plaintiff had started to sign it, he finally refused to sign because it did not contain the agreement for the payment of future wages, and that thereupon the defendant's agent tore up the memorandum and drew one containing the agreement as to wages properly stated, which the plaintiff signed and gave to the agent, who paid him \$100. The evidence of the defendant contradicted that of the plaintiff. No such memorandum as that testified to by the plaintiff's witnesses was produced by the defendant, but the defendant did produce a paper purporting to be signed by the plaintiff by which he acknowledged the receipt of "wages in full, medical attendance, and \$100 settlement in full." The defendant's agent testified that the plaintiff signed such paper and that it was the only one that he did sign. The plaintiff's witnesses denied that the plaintiff signed it. At the close of the evidence the defendant asked that all of the evidence as to the oral agreement made between the plaintiff and the defendant's agent be stricken out. The presiding judge refused to order that the evidence be stricken out, and instructed the jury that, if the negotiations resulted in a written agreement between the parties, the action could not be maintained. The jury found for the plaintiff. *Held*, that the evidence warranted a finding that the agreement between the parties had not been reduced to writing, that the jury must have found so, and therefore that the ruling asked for by the defendant was refused rightly.

CONTRACT with a declaration which, as amended, alleged in substance that the defendant, in consideration of the plaintiff's forbearing to sue the defendant for injuries alleged to have been sustained by him through the defendant's negligence, agreed to pay the plaintiff \$100 and his wages amounting to \$16.87 per week "from the time of his injury until he should be perfectly well from said injury and able to return to work," and that, after paying the wages for several months, the defendant repudiated the agreement, denied that it had made it, and refused to pay anything further. Writ dated January 17, 1908.

The case was tried before *Hitchcock, J.* The facts are stated in the opinion. At the close of the evidence, the defendant asked that "all parol evidence with regard to the signing of the release be stricken out," and asked for various rulings depending on the same principle. The presiding judge refused to rule as requested and submitted the case to the jury who found for the plaintiff; and the defendant alleged exceptions.

The case was submitted on briefs.

C. F. Baker & E. W. Baker, for the defendant.

C. E. Tupper, for the plaintiff.

SHELDON, J. There was evidence from which the jury could find that a verbal agreement was made between the plaintiff and the defendant acting through one Bennett for a settlement of the cause of action which the plaintiff claimed to have against the defendant for his personal injuries; and that by the terms of this agreement the defendant was to pay to the plaintiff the sum of \$100, and pay his bill for medical attendance and his weekly wages until he should have recovered from his injuries. According to the evidence put in for the plaintiff, Bennett then wrote out what purported to be a statement or memorandum of this agreement, and asked the plaintiff, who could not read English, to sign it, which the plaintiff either did or began to do. But the plaintiff's son, who was present, observed that this paper did not contain the agreement for the future payment of wages, and told the plaintiff not to sign it. Thereupon this paper was torn up and burned by Bennett, and he (Bennett) wrote another paper which did contain that stipulation and which the plaintiff signed and gave to Bennett and received from Bennett a check for the \$100 which was to be paid down. Bennett's testimony contradicted this, but it was for the jury to say what they would believe.

The defendant produced a paper purporting to be signed by the plaintiff under the name of Peter Pratt, and to be witnessed by the plaintiff's son and by Bennett, by which the plaintiff acknowledged the receipt from the defendant of his "wages in full, medical attendance, and \$100 settlement in full for all claims on account of an accident to person or property." Bennett testified that the plaintiff signed this, that the plaintiff's son and Bennett signed it as witnesses, and that this was the only paper which was signed and delivered to him at the time of the settlement.

The defendant put in also evidence of the genuineness of the signatures of the plaintiff and his son upon this paper. But the plaintiff and his son both testified that this paper was not the one which they had signed, and that the signature which the plaintiff had made was Pierre Laprade and not Peter Pratt. There was evidence that after this settlement had been made, the defendant did for about a year pay to the plaintiff his weekly wages without his doing any work ; and there was contradictory evidence as to whether he had recovered from his injuries. There was no dispute that the paper which the plaintiff had executed had gone into the possession of Bennett.

Manifestly upon this evidence the jury might find that the agreement between the parties had not been reduced to writing. We cannot ourselves weigh the probabilities and undertake to say what their finding ought to have been. *Marvel v. Cobb*, 204 Mass. 117. *Electric Welding Co. v. Prince*, 200 Mass. 386, 392. *Hayes v. Moulton*, 194 Mass. 157, 163. They might accept the testimony of the plaintiff and his son, and find that he had not executed the paper produced by the defendant ; they might find on the testimony of Bennett, that he executed no other paper, and so conclude that there was no written agreement. Or they might find that the paper produced by the defendant was the one which the plaintiff testified that he first signed or began to sign, that Bennett had not destroyed this, but had substituted for it some other paper and destroyed that instead ; and that either the plaintiff had signed no other paper, or that Bennett had not accepted the paper which the plaintiff did sign, but had suppressed or destroyed it. But in this event there would be no written agreement between the parties ; the first paper had not become an agreement and was not binding upon the plaintiff because he had not delivered it as an agreement ; and the second, if there was one, had not taken effect as an agreement because the defendant or Bennett in its behalf had not accepted it.

We are of opinion accordingly that the judge did not err in allowing the jury to consider the evidence of the conversation between Bennett and the plaintiff. That conversation itself, the jury could find, constituted the agreement between the parties, as no question seems to have been raised as to Bennett's author-

ity. The case does not fall within the rule of *Budro v. Burgess*, 197 Mass. 74.

The defendant has not argued its other exception. Indeed, the judge instructed the jury that if the consultations and oral negotiations of the parties resulted in a written agreement which included the whole agreement and was the agreement between the parties, the action could not be maintained. The jury must have found that there was no such written agreement, and that made most of the other questions immaterial.

Exceptions overruled.

PATRICK J. REID vs. VIRGINIA MILLER & another.

Suffolk. January 11, 1910. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Contract, What constitutes. *Evidence*, Presumptions and burden of proof. *Agency*, Undisclosed. *Husband and Wife*. *Practice*, Civil, Election between defendants, Election between counts, Exceptions.

At the trial of an action against a woman for the purchase price of stone alleged to have been furnished by the plaintiff for the building of a cellar upon the defendant's land, there was evidence tending to show that the land upon which the cellar was being built was the defendant's, but that the plaintiff did not know that fact until the action was commenced, and that the defendant's husband had told him that he owned the land and that he would pay for the stone. The defendant's husband testified that he had told the defendant that he was building the house upon her land and "that she knew what was being done there in a general way and she objected to my building it." *Held*, that the jury might have disbelieved the testimony of the defendant's husband that the defendant objected to the building of the house, and that the facts warranted a finding that the husband was the wife's agent in procuring the stone for the cellar, and that the agreement with the plaintiff was made by her authority.

At the trial of an action of contract against a husband and a wife, where the evidence is conflicting and, if the husband is found to have made a contract with the plaintiff as the wife's agent, the husband should not be held liable, but the wife should be, but, if such agency is not found to exist, the husband should be held liable but not the wife, an exception of the defendant to a refusal by the presiding judge to compel the plaintiff to elect as between the defendants will not be sustained if the jury are told in the charge that the plaintiff can recover against only one of the defendants.

The declaration in an action of contract against a husband and a wife contained three counts. The first count alleged that the defendants owed the plaintiff \$90 for stone sold and delivered by the plaintiff to the defendants. The second count alleged that at the request of one F., an agent of the defendants, the

plaintiff delivered a part of the stone and then ceased delivery because he was not paid; that thereupon the defendants promised the plaintiff to pay \$90 for the stone if he would complete the delivery, and also promised that, if the plaintiff would release F. from any claim on account of the stone and would procure an order for \$90 from F. and would deliver it to them, they would pay the plaintiff \$90; that the plaintiff delivered the stone and procured the order and delivered it to the defendants but that the defendants had not paid the \$90. The third count, added by amendment at the trial of the case and at the close of the evidence, alleged that the defendants agreed with the plaintiff that, "in consideration that he would procure from F. an order on the defendants for \$90, they would pay him \$90," and that the plaintiff procured the order and delivered it to the defendants. The counts were alleged all to be for the same cause of action. At the trial, there was evidence tending to support the allegations of all the counts except that it appeared that the plaintiff did not know the defendant wife in the transaction until the action was commenced, and the jury were correctly instructed that they could find against only one of the defendants. At the close of the evidence, the defendant asked that the plaintiff be requested to elect which count he would proceed upon. The request was refused. The jury found for the plaintiff against the defendant wife only. *Held*, that the different counts were not so at variance with one another that the plaintiff should have been precluded from relying upon them to meet such a view of the evidence as the jury might take.

The declaration in an action of contract against two persons, a husband and wife, contained three counts, all alleged to be for the same cause of action. The evidence introduced at the trial would have supported a verdict against either the husband or the wife on either of the first two counts according to the view which the jury took of the facts; but on the third count the verdict could be against the husband only. At the close of the evidence, the wife asked for a ruling that "on all the evidence the plaintiff could not recover against" her. The request did not refer to any particular count. The ruling was refused and the jury were instructed that they could find against only one of the defendants. The jury found generally against the wife. *Held*, that a request for an instruction that the wife could not be held under the third count could not be raised for the first time after the general verdict because under the judge's charge it must be assumed that the verdict was returned upon the count or counts to which the evidence was applicable, and therefore that it could not have been upon the third count.

CONTRACT. Writ in the Municipal Court of the City of Boston dated February 27, 1907.

On appeal to the Superior Court. the case was tried before *Pierce, J.*

The original declaration was in two counts. The first count alleged that the defendants owed the plaintiff \$90 for sixty perch of "stone sold and delivered by the plaintiff to the defendants." The second count alleged "that one Flaherty was doing certain work for the defendants on land owned and controlled by them, and as their agent, by their authority and

in their name ordered from the plaintiff sixty perch of stone to be delivered on said land for use in said work and paid for as delivered at the rate of \$1.50 per perch ; that on or about January 10, 1907, plaintiff had delivered thirty perch and refused to deliver any more stone until he was paid for the stone already delivered ; that thereupon the defendants requested the plaintiff to deliver the stone ordered as aforesaid and in consideration of such delivery promised to pay the plaintiff \$90 and also to hold out a like sum from money he intended otherwise to pay said Flaherty, if the plaintiff would release the said Flaherty from any claim on account of said stone and would procure and deliver to the defendants the written order of said Flaherty for the payment of a like sum of \$90 ; relying on said promise the plaintiff delivered said stone remaining to be delivered under the said order and promise, procured from said Flaherty the written order aforesaid and released said Flaherty from any demand on account of said stone and delivered said order to the defendants, all of which took place before January 20, 1907 ; and defendants promised to pay said sum of \$90, accepted said order and retained the same until February 21, 1907, when they refused to pay the plaintiff and returned to him the stone ordered . . . defendants owe the plaintiff \$90. The first and second counts are for the same cause of action."

At the close of the evidence the plaintiff by leave of court amended his declaration by adding the following third count, which was stated to be for the same cause of action as the first and second counts :

" The defendants promised and agreed with the plaintiff that, in consideration that he would procure from one M. Flaherty an order on defendants for \$90, they would pay him \$90 ; and thereupon, in consideration thereof, the plaintiff procured such order and delivered the same to the defendants, and the defendants owe the plaintiff \$90."

The plaintiff testified in substance that Michael Flaherty had asked him to furnish the stone for a cellar which he was building for a man named Miller ; that he and Flaherty agreed upon the price of the stone ; that he furnished about half of it, when, the cellar not being built and he receiving no pay, he stopped

delivering stone; that thereupon a man who stated himself to be Robert F. Miller called him up on the telephone, and that during the conversation which ensued Miller said to him, "I am the owner [of the premises where the stone is to be used]. Deliver the rest of the stone and I will pay you for it." The witness further testified that, after he had delivered all of the stone, he sought his pay from Miller; that Miller wrote out an order and asked him to have Flaherty sign it and then to present it to him, Miller, and he would pay it; that he, the plaintiff, did as requested, but that then Miller said that he could not pay him because he was "short of money on that cellar," that he had a contract with Flaherty and had used up the balance of the money to finish that contract; that he, the plaintiff, first learned that Virginia Miller, the wife of Robert F. Miller, had title to the property when this action was brought.

The order above referred to was as follows:

"Newton, January 10, 1908. Please pay to P. J. Reid or order Ninety Dollars for stone furnished to building on Boylston Road for Virginia Miller. — To Robert F. Miller, Boston, Mass. — M. Flaherty."

It was admitted that when the stone was delivered the property stood in the name of Virginia Miller.

Robert F. Miller testified in substance that he in his own name made an agreement in writing with Michael Flaherty for the building of the cellar in question. His testimony as to the interviews with the plaintiff controverted that of the plaintiff in many essential particulars. He also testified, "I told the defendant, Virginia Miller, that I was building this house upon her land and she knew what was being done there in a general way and she objected to my building it."

At the close of the evidence, the defendant asked for rulings which are described in the opinion and also for a ruling "that on all the evidence the plaintiff cannot recover against the defendant, Virginia Miller." The rulings were all refused. The jury found for the defendant Robert F. Miller and for the plaintiff against the defendant Virginia Miller; and the defendant Virginia Miller alleged exceptions.

D. C. Delano, for the defendant Virginia Miller.

D. L. Smith, for the plaintiff.

KNOWLTON, C. J. In this action a husband and wife were sued jointly to recover the price of stone used in the construction of a house on land of the female defendant. At the close of the evidence the judge was asked to rule that there could be no recovery against this defendant. This ruling was refused, and the verdict was against her alone. The evidence showed that the husband made a contract or contracts under which the stone were furnished, and it was not disputed that the stone were used in the construction of the cellar wall of the house. This defendant knew that the house was being erected, and knew in a general way what was being done there. The question is whether, from this evidence, the jury might infer that the work was being done by her authority. If it was done by her authority, and nothing more appeared, the law would imply a promise to pay for it.

In *Beston v. Amadon*, 172 Mass. 84, 86, this court quoted with approval the language of Mr. Justice Hoar in *Westgate v. Munroe*, 100 Mass. 227, that the court entertained "no doubt that if a person, with the knowledge of the owner, performs valuable services upon the separate property of a married woman, it is evidence of an employment by her, and may authorize a jury to find a contract by her to pay for it." It is a fair inference that ordinarily a person will not perform valuable services upon the real estate of another person without authority from the owner. The fact of performance of such services well warrants an inference of authority.

The ultimate fact to be ascertained in such cases is whether there was an employment from which arises, either expressly or by implication, an obligation to pay. The facts in the present case include everything that was shown in the case first referred to, except that in that case a payment was made by the defendant's husband, from her money, for some painting on a part of the place where they lived, upon which the greenhouse was erected by her son in law, for material used in the construction of which the plaintiff was allowed to recover. As the payment for the painting was not made by the person who contracted the debt for which the suit was brought, and as it was not for the painting of any part of the greenhouse, this portion of the evidence seems to have been of but little con-

sequence. In every such case all the facts are to be considered, to ascertain whether there was or was not a contract, express or implied.

In the present case the jury might have disbelieved the testimony of the husband that this defendant objected to the building of the house. It is plain from the evidence that he was managing that part of her property, — a fact which was deemed important in *Arnold v. Spurr*, 130 Mass. 347. The relation of husband and wife that existed between this manager and the owner of the land is a fact of significance, in connection with the nature of the work that was going on. There is a broad field for legitimate inference by a jury from facts like these. Besides the cases cited above, see *Dyer v. Swift*, 154 Mass. 159, *Wheaton v. Trimble*, 145 Mass. 345, and *Gannon v. Shepard*, 156 Mass. 355. We are of opinion that the jury were rightly permitted to find that the husband was the wife's agent in procuring the material for this important addition to her real estate.

The defendant also asked for a ruling that the plaintiff should be required to elect which defendant he would proceed against, and also to elect which of his counts he would proceed upon. These rulings were refused.

As to the first, the judge instructed the jury that the plaintiff could recover against only one of the defendants. There was evidence that would have warranted a finding against either of them, although they were not liable jointly. Under these circumstances, the instruction to the jury was sufficient. Under our statute, which permits a verdict in favor of one and against another of two defendants sued jointly, an election between the two should not be required upon doubtful evidence, unless the grounds of recovery relied upon are such that the plaintiff cannot consistently pursue both at the same time. R. L. c. 177, § 6. *Taft v. Church*, 162 Mass. 527, 533.

The different counts were not so at variance with one another that the plaintiff should be precluded from relying upon them to meet such a view of the evidence as the jury might take. It is true that one dealing with an agent of an undisclosed principal cannot hold the principal, if, after full knowledge of the principal's liability, he elects to rely upon the agent. But his failure to give up the claim upon the agent before the facts are fully

ascertained does not bar his recovery from the principal. *Raymond v. Crown & Eagle Mills*, 2 Met. 319. *Dyer v. Swift*, 154 Mass. 159. *Gardner v. Bean*, 124 Mass. 347.

In the present case it does not appear that the plaintiff attempted to enforce a claim upon Flaherty, after he was fully informed of the facts. As between this defendant and her husband, it was uncertain which was the principal and the real proprietor of the business that was going on.

No request was made for an instruction that this defendant could not be held upon the third count, and the question as to that count cannot now be raised for the first time under a general verdict for the plaintiff, upon evidence which warranted the verdict on some of the counts. Under the judge's charge it will be assumed that the verdict was found upon the count or counts to which the evidence was applicable.

The general exception to the charge raises no questions except as to those portions of it which were inconsistent with the rulings requested. *Savage v. Marlborough Street Railway*, 186 Mass. 203.

Exceptions overruled.

FREDERIC DE REISET & others vs. JAMES J. LOUGHERY
& another.

Suffolk. January 11, 1910.—February 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BEALEY, & SHELDON, JJ.

Bills and Notes, Rights of holder in due course.

Under R. L. c. 78, §§ 69-74, one who purchases a foreign bill of exchange for cash before maturity and without notice of any infirmity is a holder in due course, and in an action on the bill against the acceptor by one having the rights of such a holder, the defense that the drawer of the bill secured its acceptance by fraud or misrepresentation is not open to the defendant; nor in such an action is the bill subject to a counter claim or set-off against the drawer.

CONTRACT on two foreign bills of exchange drawn by Huile-ries-Loubrie and Company of Bordeaux, France, upon the defendants, and accepted by them upon presentation, both bills having been dishonored at maturity and duly protested by the holders. Writ dated October 25, 1907.

The bills were respectively one for 2,051 francs dated May 28, 1907, due August 31, 1907, accepted June 25, 1907, and protested September 3, 1907, and one for 3,196 francs dated June 19, 1907, due September 15, 1907, accepted July 8, 1907, and protested September 16, 1907.

The answer of the defendants, among other defenses, set up that the defendants had a counter claim against the drawers for overcharges, and that the plaintiffs in this action (they being the last indorsees) were nominal holders in the interest of the drawers. The same matter also was alleged in a declaration in set-off.

At the trial in the Superior Court before *Fessenden, J.*, it appeared from answers to interrogatories filed by the defendant that the drawers had sold both the bills before maturity for cash and without recourse to the Bank of Bordeaux, and that in its turn the Bank of Bordeaux had sold them in the same way to the plaintiffs, who were copartners doing business as a banking house under the firm name of John Munroe and Company; it further appeared that after the bills had been dishonored the Bank of Bordeaux reimbursed the plaintiffs for their loss, and that the plaintiffs at the time of the trial held the bills only for collection on behalf of the Bank of Bordeaux. It did not appear whether or not the reimbursement took place before or after this action was brought.

At the close of the evidence the defendants asked the judge to make, among others, the following rulings:

"2. The plaintiffs cannot recover of the defendants if Loubrie and Company secured the acceptance of the bills of exchange or of either of them through fraud or misrepresentation.

"3. If Loubrie and Company gave to the defendants the wrong prices for the goods and the duties and charges thereon intending to mislead the defendants and they were misled thereby and so accepted said bills of exchange they are not liable thereupon.

"4. If Loubrie and Company agreed to repay the defendants the amount of the overcharges, \$218.89, the plaintiffs in set-off have a valid claim against the defendants in set-off therefor."

"7. If the plaintiffs are merely the holders of the bills of exchange for the purposes of collection any valid claim of the de-

defendants against the drawers of the bills of exchange may be set off against the bills of exchange."

The judge refused to make any of these rulings, and submitted the case to the jury with full and appropriate instructions apart from the refusal of the foregoing requests. The jury returned a verdict for the plaintiffs for the amount of both bills with interest; and the defendants alleged exceptions.

The case was submitted on briefs.

L. M. Bacon, for the defendants.

F. Peabody, Jr., & E. K. Arnold, for the plaintiffs.

HAMMOND, J. There was ample evidence, indeed it was overwhelmingly in that direction, that the Bank of Bordeaux for whose benefit the action was brought was at all times a *bona fide* holder in due course; and therefore that it held the bills free from the defenses of fraud and overcharge set up in the answer and was without liability for the overcharge set up in the declaration in set-off. R. L. c. 73, §§ 69-74, both inclusive. The second, third and fourth requests were therefore properly refused.

And the same may be said of the seventh. There was no contention that the plaintiffs were parties to any fraud or illegality. The request is therefore subject to the same objection as the others. It totally disregards the rights of the former holder in due course on whose behalf the action was brought. R. L. c. 73, § 75.

Exceptions overruled.

MARGARET J. PRINGLE vs. SPRING GARDEN INSURANCE COMPANY.

Suffolk. January 11, 1910. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Insurance, Fire. Agency. Estoppel.

One who has been appointed by the authorized agents of a fire insurance company a "subordinate agent" and has received from the insurance commissioner a license, still existing, stating that he has complied with the laws relating to agents of such companies and is authorized to transact within this Commonwealth, for the company in question, "the business of fire insurance so far as he may be

legally empowered to do so by the aforesaid company as its sub-agent," but who has not been authorized by the insurance company nor by its agents who appointed him, nor by any other person acting for the company, to make contracts of insurance or to make indorsements on policies or to assent to removals of property, cannot bind the insurance company by his assent to the removal of certain household furniture covered by a policy issued by the company in the Massachusetts standard form upon such property in a certain building, by receiving such policy from its holder and agreeing to have it changed to cover the property when removed to another building, and his acts and promises in this regard cannot estop the insurance company, when sued upon the policy, from setting up the defense that the insured property when destroyed by fire had been removed from the premises described in the policy without the assent in writing or in print of the company when such removal was not necessary for the preservation of the property from fire.

CONTRACT on a policy of fire insurance in the Massachusetts standard form as prescribed by R. L. c. 118, § 60, covering household furniture, wearing apparel and other personal property contained in a double frame dwelling house and its additions at No. 4 Riverside Street in that part of Boston called Roxbury, and destroyed by fire on April 12, 1908, after their removal to No. 70½ Marlborough Street in Chelsea. Writ in the Municipal Court of the Roxbury District of the City of Boston dated May 22, 1908.

In the Superior Court the case was submitted to *Crosby, J.*, without a jury on an agreed statement of facts, which was as follows:

The number of the policy was 28571. It was dated January 12, 1906, and was for three years. The amount of the insurance was \$500.

The policy contained the words, "This policy shall not be valid unless countersigned by the duly authorized agent of the company at Boston, Mass.," and was countersigned at Boston "Darling & Russell, Agents." On or about May 27, 1906, the plaintiff removed her furniture and other property described in the policy to No. 75 Sixth Street in Chelsea. On June 6, 1906, the following indorsement was made upon the policy by Darling and Russell: "Boston, June 6, 1906. On and after date, this policy shall attach on property as herein described while being removed to and contained in frame dwelling situate 75 Sixth St, Chelsea, Mass, and during removal this policy to attach in each building or locality in proportion as the value in each bears to that in all, and after ten days from date in new

location only and not as hereinbefore. Attached to policy No. 28571 Spring Garden Insurance Co. Darling & Russell, Agents."

This policy was a renewal of policy No. 5081 issued by the defendant to the plaintiff on January 12, 1903, for the term of three years, insuring the plaintiff in the same amount on the same or similar property "contained in and on brick building situate No. 4 Burke Street, corner of and being No. 1011-13 Tremont Street, Boston, Mass." The following indorsements appear on said policy No. 5081:

"Boston, December 7, 1903. On and after date this policy shall attach on similar property while being removed to and contained in double frame dwelling house situated No. 9 Reeds Court, Boston, Mass. Attached to policy No. 5081 Spring Garden Insurance Co. Darling & Russell, Agents."

"Boston, October 23, 1905. On and after date this policy shall attach on similar property while being removed to and contained in double frame dwelling house No. 4 Riverside Park, Roxbury District, Boston, Mass. Attached to policy No. 5081 Spring Garden Insurance Co. Darling & Russell, Agents."

"November 6, 1905. Endorsement of October 23, 1905, should have read No. 4 Riverside *Street* instead of *Riverside Park*, as reported. Attached to policy No. 5081 Spring Garden Insurance Co., Darling & Russell, Agents."

On June 18, 1907, the plaintiff removed the property described in the policy No. 28571 from the house No. 75 Sixth Street to a house at No. 70½ Marlborough Street in Chelsea. This removal was not necessary for the preservation of the property described in the policy from fire and no assent in writing or in print of the defendant was given to such removal.

On April 12, 1908, a fire occurred at No. 70½ Marlborough Street in Chelsea, and the property described in the policy was totally destroyed. Within a few days thereafter, the plaintiff's attorney called upon one Herbert F. Blood, a special agent of the defendant, and told him that he represented the plaintiff, that she was burned out in the conflagration and that she had a policy in the defendant company. Blood told the plaintiff's attorney that he would look into the matter and advise him.

On April 17, 1908, Blood wrote to the plaintiff's attorney as

follows: "Referring to the Pringle matter, Chelsea, about which you spoke to me at my office yesterday, have looked up our records and found that on January 12, 1906, we issued a policy to Margaret J. Pringle, covering household furniture at No. 4 Riverside Street, Roxbury, Mass; on June 6, 1906, the insurance was transferred to No. 75 Sixth Street, Chelsea. I have examined the building to-day and found that there is no damage resulting from the conflagration of last Sunday, therefore there can be no claim under this policy."

Thereafter there was no communication between the plaintiff or the plaintiff's attorney and the defendant or Darling and Russell or Blood except that on May 4, 1908, the plaintiff's attorney called at Blood's office. Blood was out, and the plaintiff's attorney left word that he had called.

On May 22, 1908, this action was brought.

On January 1, 1903, the firm of Darling and Russell, having a usual place of business at No. 55 Kilby Street, Boston, Mass., were the general agents of the defendant for Boston, Everett, Chelsea, and certain other places, duly authorized by the defendant to issue policies of fire insurance and make indorsements thereon. Darling and Russell also were empowered by the defendant to appoint subordinate agents of the company.

On January 1, 1903, Darling and Russell notified the insurance commissioner that they had appointed as "subordinate agent" of the defendant one Jesse F. Rogers of Roslindale, Mass.; and on January 3, 1903, the insurance commissioner issued to Rogers a license stating that the Spring Garden Insurance Company was authorized through licensed, resident agents, to transact the business of fire insurance in this Commonwealth, and that Rogers "has duly complied with the laws relating to agents of such companies and is authorized to transact within this Commonwealth, for the aforesaid company, the business of fire insurance so far as he may be legally empowered to do by the aforesaid company as its sub-agent."

Darling and Russell continued to be such agents until the latter part of the year 1908, and Rogers until July 1, 1908, from year to year received from the insurance commissioner a certificate stating that his license was renewed and was continued in force for the period of one year from date. Rogers was not author-

ized by the defendant nor by Darling and Russell, nor by any one else in behalf of the defendant, to make contracts of insurance, or to make indorsements on policies, or to assent to removals of property, nor did he during the period of his subordinate agency make any contracts of insurance, nor assent, in writing or in print, to removals of property, nor make any indorsement on any of the defendant's policies.

Both policies No. 5081 and No. 28571 were negotiated by Rogers from Darling and Russell, and on each occasion of removal he received the policy from the plaintiff, forwarded it to Darling and Russell, and upon its return by them, turned it over to the plaintiff when she called for it.

On or about June 15, 1907, the plaintiff took the policy No. 28571 to Rogers and directed that the policy be changed to cover her property at No. 70½ Marlborough Street, Chelsea, Mass. Rogers took the policy and told the plaintiff that he would arrange for the transfer of it and that the property would be covered at the new location.

Thereafter, the plaintiff saw Rogers once a week for a period of three or four weeks and on each occasion asked Rogers for her policy and Rogers replied that it had not been returned. On the last occasion, he told her that when it did return he would keep it for her until she called.

Neither Darling and Russell nor the defendant company ever had possession of the policy No. 28571 after June 6, 1906, when it was returned by Darling and Russell to Rogers who turned it over to the plaintiff.

Neither the defendant nor Darling and Russell before the bringing of this action knew that the plaintiff had given to Rogers the policy on or about June 15, 1907, nor of the conversations between the plaintiff and Rogers on that date and on later dates.

If these facts warranted a finding for the plaintiff damages were to be assessed in the sum of \$500; if not, judgment was to be entered for the defendant.

The judge found for the defendant; and the plaintiff appealed.

F. Juggins, for the plaintiff, submitted a brief.

W. L. Came, for the defendant.

MORTON, J. Assuming without deciding that the special agent Blood had authority to waive the proof of loss and the

submission to arbitration, we do not find it necessary to decide whether the letter sent by him to the plaintiff's attorney could be found to constitute such waiver, since we are of opinion that the policy was void for want of the defendant's written or printed assent to the removal of the goods from Sixth Street to Marlborough Street. The policy expressly provided that it should be void if the property was removed without the written or printed assent of the company, except that, if a removal should be necessary for the preservation of the property from fire, the policy should be valid without such assent for five days thereafter. It is not contended that it was necessary for the protection of the property to remove it, or that the company or the general agents Darling and Russell, whose territory included Chelsea, assented in writing or in print to the removal. The contention is in effect that the company is estopped by reason of what occurred between the plaintiff and Rogers from setting up that there was no written or printed assent by it or its authorized agents to the removal. But it is expressly agreed that "Rogers was not authorized by the defendant nor by Darling and Russell, nor by any one else in behalf of the defendant, to make contracts of insurance, nor to make indorsements on policies, nor to assent to removals of property," and that he did not "during the period of his subordinate agency make any contracts of insurance, nor assent, in writing or in print, to removals of property, nor make any indorsement on any of the defendant's policies." It is also expressly agreed that "Neither the defendant nor said Darling and Russell prior to the bringing of this suit knew that the plaintiff had given to said Rogers said policy, on or about June 15, 1907 [the date when, as the plaintiff testified, she took the policy to Rogers to have it changed so as to cover the property at Marlborough Street], nor of the conversations between the plaintiff and said Rogers on that date and on later dates." There was nothing, therefore, in the nature of the authority which Rogers had, nor any such knowledge on the defendant's part of what had transpired between the plaintiff and Rogers as to estop the defendant from objecting that the policy was void for want of its written or printed assent to the removal of the property. The fact that Rogers had transmitted the policy from the plaintiff to Darling and Russell for their written or printed assent to previous re-

movals does not and cannot operate to estop the defendant from relying on the fact that no such written or printed assent was procured to the removal in question. It is not necessary to consider whether Rogers is personally liable to the plaintiff. It follows that the judgment in favor of the defendant must be affirmed.

So ordered.

INHABITANTS OF WESTON & another *vs.* BOARD OF RAIL-
ROAD COMMISSIONERS & another.

WILLIAM E. BRIGHT & others *vs.* SAME.

Suffolk. January 11, 12, 1910. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Railroad Commissioners. Electric Railroad. Certiorari. Words, "Refusal."

Under St. 1906, c. 516, § 5, which provides that the directors named in a written agreement of association for the formation of an electric railroad company may apply to the board of railroad commissioners for a certificate that public convenience and necessity require the construction of a railroad as proposed in such agreement, and further provides that, "if said board refuses to issue such a certificate, no further proceedings shall be had, but the application may be renewed after one year from the date of such refusal," the dismissal of such an application without prejudice at the request of the applicants is not such a refusal, nor is the dismissal of an application for an informality upon a like request, the word "refusal" in the statute meaning an adjudication against the application founded upon a determination of the question whether in the public interest it ought or ought not to be granted; and after the dismissal of such an application for an informality at the request of the applicants, the application may be renewed in proper form before the expiration of a year.

Upon a petition for a writ of certiorari to correct alleged errors of law in proceedings before the board of railroad commissioners, the only facts outside the original record which can be considered by the court are those set up in the official answers of the commissioners.

In a petition for a writ of certiorari to correct alleged errors of law in proceedings before the board of railroad commissioners, the clerk of that board, whose duties are defined by St. 1906, c. 463, Part I § 1, should not be joined as a respondent, the records which it is his duty to keep being subject to the control of the commissioners so far as is essential to the proper administration of justice in the proceedings before them.

Whether a writ of certiorari is the proper remedy to correct errors of law made by the board of railroad commissioners upon an application under St. 1906, c. 516, § 5, by the directors named in a written agreement of association for the formation of an electric railroad company for a certificate that public convenience

and necessity require the construction of a railroad as proposed in such agreement, or whether the proper remedy would be in equity, here was not considered, because it was held that the commissioners had made no error.

KNOWLTON, C. J. These are petitions for a writ of certiorari to correct alleged errors of law in proceedings before the railroad commissioners. The presiding justice,* after a hearing, directed the entry of an order in each case that the petition be dismissed, and at the request of the petitioners, he reported the cases to this court. The proceeding before the railroad commissioners was an application of the Boston and Western Electric Railroad Company for a certificate that public convenience and necessity required the construction of a railroad, as proposed in an agreement of association for the formation of an electric railroad company under the St. 1906, c. 516, § 5. By § 5 of this chapter the act provides that the agreement shall state numerous facts, as therein set forth. The last sentence in § 5 is as follows: "If said board refuses to issue such certificate, no further proceeding shall be had, but the application may be renewed after one year from the date of such refusal."

Three different applications were made, the first by subscribers with the intention of forming "the Boston, Waltham and Western Electric Railroad Company," and the last two for the formation of the "Boston and Western Electric Railroad Company." The first of these was dismissed without prejudice at the request of the applicants, and the second was dismissed for an informality, in accordance with a like request of the applicants. This informality was the failure to state the par value of the shares in the agreement of association. When the third was before the railroad commissioners, sundry respondents, who are the present petitioners, contended that the disposition of each of the former applications was a refusal to issue the certificate, within the meaning of the statute, and that the three applications were identical, so that the prosecution of the last one before the expiration of a year was a further proceeding that is forbidden by the statute. The railroad commissioners ruled that the dismissal of the first application without prejudice, at the request of the applicants, and the dismissal of the second application for an informality, in accordance with a like request, were

* *Braley, J.*

not such refusals, inasmuch as the board did not make any decision upon the questions involved in the applications. They accordingly retained jurisdiction of the last application, and after a hearing, were about to make a decision upon it, when these petitions were filed.

Certain questions of form and procedure have been raised, some of which are not free from difficulty. These are, whether the remedy of the petitioners for the alleged error is not in equity (see St. 1906, c. 516, § 11; St. 1906, c. 463, Part III. §§ 155, 157; *Kilty v. Railroad Commissioners*, 184 Mass. 310, 311); whether the petitions are prematurely brought; whether certain evidence was properly excluded, and whether Charles E. Mann, the clerk of the board, was properly joined as a respondent. Some of these it will not be necessary to consider; for if they should all be decided in favor of the petitioners, we are of opinion that, for other reasons, they could not prevail. As all parties desire us to deal with the substantive questions of law on which the petitioners rely, and as a decision of these will settle the rights of the parties in these suits, we will proceed to them directly.

The provision of the statute is that, if the board refuses to issue the certificate, no further proceedings shall be had. The purpose of this evidently is that, after a deliberate adjudication against a project of this kind, the railroad commissioners shall not be required to try the same questions over again, and parties who might be opposed to the project for good reasons shall not be called upon to appear again in opposition to it, until such time has elapsed as reasonably might be expected to produce a change in conditions. That time may work such a change is recognized by the Legislature in the provision that the application may be renewed after one year from the date of the refusal. It was never intended that the railroad commissioners should not have the power, at the request of the petitioners, to deal with a technical error or an informality in the application, otherwise than by a refusal that should bar the parties from further proceedings for a year. What is meant by "refusal" is an adjudication against the application, founded upon a consideration of it in its substantive parts, and a determination of the question whether, in its features which affect its desirability in

the public interest, it ought or ought not to be granted. So long as there is no adjudication upon such questions, there is no good reason why the railroad commissioners should not permit such action as will enable the petitioners to correct technical mistakes or informalities. The request was similar to an application for a nonsuit in an action at law, or a request that a bill in equity be dismissed without prejudice, for want of prosecution. Moreover, the question is, not what the petitioners may do under a claim of right, but what the tribunal may permit in the exercise of its discretion. While the rule in equity is not precisely the same as at law, the general principle, both at law and in equity, is that the plaintiff may abandon his suit without being barred, whenever it can be done without injuriously affecting rights of the defendant acquired by reason of the bringing of the suit. *Derick v. Taylor*, 171 Mass. 444. *Hollingsworth & Vose Co. v. Foxborough Water Supply District*, 171 Mass. 450. *Worcester v. Lakeside Manuf. Co.* 174 Mass. 299, 301.

It is true that costs are allowed upon a nonsuit at law, and may be decreed when a bill in equity is dismissed without prejudice, and that there is no provision for awarding costs in a case of this kind. But that consideration does not mark a distinction of much importance. This kind of proceeding is expected to affect chiefly, although not entirely, the interests of the public. Private rights are protected in other ways.

The record shows that the first and second applications were materially different in important particulars affecting the question whether a certificate ought to be granted, and if the first had been refused absolutely, it would not have barred the second application, which presented a different case for the consideration of the board. Treating the second and third applications as substantially the same, we are of opinion that the railroad commissioners were right in holding that the dismissal of the second at the request of the applicants, for an informality, was not a refusal of it within the meaning of the statute.

The evidence as to the alleged admission of the counsel for the company at the hearing upon the last application, tending to show that the incorporators or promoters in the last application were substantially the same as in the former ones, was rightly excluded. In the view that we have taken of the law,

this was entirely immaterial. Besides, the facts set up in the official answers of the tribunal in a case of this kind are the only facts outside of the original record upon which the petitioners can rely in support of their contention. *Ward v. Newton*, 181 Mass. 432, 433. *Farmington River Water Power Co. v. County Commissioners*, 112 Mass. 206, 214.

We are of opinion that the respondent Mann, the clerk of the board, was not properly joined. He was appointed to keep a record of the proceedings of the board and to serve notices under its direction. St. 1906, c. 463, Part I. § 1. His position in reference to his duties is similar to that of the clerk of the county commissioners, or the clerk of a court of common law. These suits are to correct alleged errors of law in judicial proceedings. The records of the courts are subject to the control of the judges, so far as may be essential to the proper administration of justice. We see no reason for making the clerk a party to a suit of this kind.

Without determining whether the petitioners have sought their remedy in a proper way, we are of opinion that they have failed to show any error in the proceedings before the railroad commissioners.

Petitions dismissed.

W. N. Buffum, for the petitioners.

S. C. Bennett, for the petitioners for certiorari.

H. W. Dunn, for the intervenors.

D. Malone, Attorney General, & *F. B. Greenhalge*, Assistant Attorney General, for the board of railroad commissioners.

MARIA A. McMAHAN & another vs. ELLEN E. McMAHAN.

Suffolk. January 12, 1910. — February 28, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Mortgage, Of real estate.

A portion of R. L. c. 182, § 15, which originally was St. 1882, c. 237, provides that when the record title of land is encumbered by an undischarged mortgage, and the mortgagor and those having his estate therein have been in uninterrupted possession of the land for twenty years after the expiration of the time limited in the mortgage for the full performance of the condition thereof, he or they may apply to the court by petition setting forth the facts, and if, after such notice by publication or otherwise as the court orders, no evidence is offered of a payment on account of the debt secured by such mortgage within twenty years after the expiration of the time limited for the performance thereof or of any other act in recognition of its existence as a valid mortgage, the court may enter a decree reciting the facts and findings, which shall be recorded in the registry of deeds for the county or district in which the land lies, and no action to enforce a title under the mortgage shall thereafter be maintained. Upon a petition in the Land Court under this statute the petitioner introduced evidence tending to prove the averments of his petition, and the respondent introduced evidence tending to show that a payment was made on account of the mortgage less than twenty years before the filing of the petition, and introduced other evidence tending to show that the mortgage had been recognized by the mortgagor as valid within twenty years. The judge dismissed the petition, and ruled that upon the introduction of this evidence by the respondent the court had no authority to enter a decree for the petitioner under the statute. *Held*, that the petition was dismissed rightly, and that the ruling of the judge was correct, the court having no jurisdiction to make a decree where evidence is offered of a payment on the mortgage or of a recognition of it within twenty years.

PETITION, filed in the Land Court on May 15, 1909, under R. L. c. 182, § 15, to relieve the record title of certain real estate on Liverpool Street in that part of Boston called East Boston, owned by the petitioners and the respondent as tenants in common, from an undischarged mortgage given by Francis McMahan, the father of the parties, to the East Boston Savings Bank on August 8, 1871, to secure the payment of \$1,500 with interest at eight per cent, and assigned by that savings bank to the respondent on April 20, 1878.

The case was heard by *Clark, J.* The evidence introduced by the parties is described in the opinion. The judge ordered

that the petition be dismissed, and made the ruling which is stated in the opinion. The petitioners alleged exceptions.

Jere J. McCarthy, (*P. M. McArdle* with him,) for the petitioners.

O. B. Mowry, for the respondent.

KNOWLTON, C. J. This is a petition under the R. L. c. 182, § 15, to relieve the record title to certain real estate from the incumbrance of an undischarged mortgage held by the respondent. The petition is founded upon that part of the section which originally was St. 1882, c. 237, and it avers that the mortgagor and those having her estate in the premises have had uninterrupted possession of the real estate for more than twenty years after the expiration of the time for the full performance of the conditions of the mortgage, and that no payment on account of the debt secured by the mortgage has been made and no act in recognition of its existence as a valid mortgage has been done within twenty years.

At the hearing in the Land Court the petitioners introduced evidence tending to prove the averments of their petition, and evidence was introduced by the respondent that a payment was made on account of the mortgage less than twenty years ago, and other evidence that the mortgage has been recognized by the mortgagor as valid within twenty years. The judge dismissed the petition, and ruled that, upon the introduction of this evidence by the respondent, the court had no authority to enter a decree for the petitioners under this section. The case is before us upon an exception to this ruling.

The statute provides, as to this class of mortgages, that the court may enter a decree for the petitioner reciting the facts and findings, only when no evidence is offered of a payment on account of the debt within twenty years, or of any other act of recognition of the existence and validity of the mortgage. When such evidence is offered, the court has no jurisdiction to proceed further in favor of the petitioner.

The contention of the petitioners overlooks the character of this proceeding. Its nature is shown in the original enactment in St. 1882, c. 237, which is consolidated with other similar statutes in the section of the Revised Laws above referred to. The statute was intended to provide a simple and easy way of

removing this kind of incumbrance from the record in cases where there is no controversy. It gives no jurisdiction to determine the validity or invalidity of a disputed mortgage of long standing. Even for the purposes for which it was intended, the court, in *Tarbell, petitioner*, 160 Mass. 407, 409, intimated a doubt as to its effect upon the rights of mortgagees without actual notice of the petition. The only affirmative action that the court can take is to make a decree reciting the facts and findings; and this it can do only when no evidence is offered of a payment upon the mortgage, or of a recognition of it, within twenty years.

In *Brintnall v. Graves*, 168 Mass. 384, the court refrained from intimating an opinion as to whether a decree for the petitioner should be entered, and, if so, what would be its effect, if it appeared that there had been no payment or recognition of the mortgage by the mortgagor within twenty years, and at the same time it appeared otherwise that there was a valid mortgage which remained unpaid. But there was a strong intimation, which later, in *Mitchell v. Bickford*, 192 Mass. 244, 246, was changed into a categorical statement, that the object of the statute is to provide for the removal of a cloud from the title when there has been twenty years' continuous possession by the mortgagor without recognition of the mortgage. Constitutional questions that might arise, as to interested persons who receive no notice, have not been considered.

Where there is a controversy between the parties as to the validity and effect of a mortgage of this class, there are other ways of settling it. This statute is not applicable to such cases.

Exceptions overruled.

GILBERT A. A. PEVEY vs. JAMES F. AYLWARD & another.

Middlesex. January 12, 13, 1910. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Cambridge, City solicitor. Municipal Corporations. Elections.

In the provision of the revised charter of the city of Cambridge, contained in St. 1891, c. 364, § 20, as amended by St. 1907, c. 491, that in the year 1908, and every third year thereafter, in the month of April the city council shall elect a solicitor for the city of Cambridge, the mention of the month in which the election shall be held is merely directory, and, upon a petition for a writ of mandamus contesting the validity of the election of a city solicitor by the city council of that city, it was conceded that the first election after the amendment of 1907 could take place lawfully on June 29, 1909.

A provision contained in the Joint Rules and Orders of the City Council of the city of Cambridge that every ordinance and every order requiring concurrent action shall, after passing one board, remain in the possession of the clerk of that board for thirty-six hours, to give an opportunity for a motion for reconsideration, has no application to the election of a city solicitor by a concurrent vote of the city council of that city taken orally as required by R. L. c. 26, § 7, such a proceeding not being an ordinance or an order.

A rule of the common council of a city providing that "in the absence of the president, the clerk, and in his absence, the senior member present, shall call the council to order, and preside until a president *pro tempore* is chosen by ballot," applies only to the organization of a meeting in the absence of the president, and has no application where, after a meeting has been organized and has been doing business, the president abandons his post, leaving the meeting without a presiding officer. In such a case the meeting properly may choose a presiding officer in any reasonable way.

Section 20 of St. 1891, c. 364, of the revised charter of the city of Cambridge, as amended by St. 1907, c. 491, provides that at the times there directed the city council shall by concurrent vote, the board of aldermen acting first, elect a solicitor for the city. The board of aldermen acting under this statute voted to elect a certain person city solicitor and sent a communication to the common council giving notice of the election. On the receipt of this communication, a member of the common council moved to adjourn. The president declared that this motion was carried, "and immediately left the chair." The vote on the motion was doubted. A member of the council at once assumed the chair, and upon the motion of another member was chosen president *pro tempore*. A committee which was appointed to wait on the president and request him to resume his duties reported that they were unable to find the president. The communication from the board of aldermen giving notice of their election of a city solicitor then was read by the president *pro tempore*, and the council upon motion proceeded to the election of a city solicitor, the roll being called and the vote taken *viva voce* as required by R. L. c. 26, § 7. A majority of the members present, who also were a majority of all the members of the common council, voted for the same person elected by the board of aldermen, the person voted for was declared to have been elected city solicitor, and notice to this effect

was sent to the board of aldermen. A rule of the common council was as follows : "The president shall declare all votes. If any member doubts the vote, the president, without further debate upon the question, shall require the members voting in the affirmative and negative to rise and stand until they are counted." Upon a petition for a writ of mandamus contesting the validity of the election of the city solicitor, it was *held*, that upon the election of a temporary presiding officer, it became his duty to resolve the doubt on the motion to adjourn, and that, although in doing this the temporary president and the council did not follow the rule, yet, by proceeding to do business apparently by common consent and without objection from anybody, they resolved the doubt in regard to the vote on the motion to adjourn, their action being inconsistent with any other conclusion than that the motion was not carried ; that this action, appearing to have been taken by the unanimous consent of all the members present and its meaning being plain, was as effectual as if it had been regular ; and that the president's declaration before leaving the chair that the motion to adjourn was carried became of no effect when the vote was doubted without delay ; therefore, that the election of the city solicitor was valid.

PETITION, filed on November 16, 1909, for a writ of mandamus commanding the respondent James F. Aylward to refrain from performing the duties of city solicitor of the city of Cambridge and commanding the respondent William F. Brooks as mayor of the city of Cambridge to recognize the petitioner as such city solicitor.

The case came on to be heard, upon the pleadings, an agreed statement of facts and the exhibits attached thereto, before *Hammond, J.*, who reserved it for determination by the full court, such order or decree to be made as law and justice might require.

S. D. Elmore, (*P. R. Ammidon* with him,) for the petitioner.

H. Parker, (*F. M. Phelan* with him,) for the respondent Aylward.

F. J. Carney, for the respondent Brooks.

KNOWLTON, C. J. This is a petition for a writ of mandamus to prevent the respondent Aylward from acting as city solicitor for the city of Cambridge, and to compel recognition of the petitioner's alleged right to that office. The question turns upon the validity of Mr. Aylward's election, which was declared by the common council in concurrence with the board of aldermen on June 29, 1909. It is not now contended that the election was invalid because it was not held in the month of April, according to the requirement of the St. 1891, c. 364, § 20. See *Rutter v. White*, 204 Mass. 59 ; *Cheney v. Coughlin*, 201 Mass. 204.

On June 29, 1909, this respondent was legally elected by the

board of aldermen, and notice of his election was sent to the common council. The statutory provision is as follows: "In the year one thousand nine hundred and eight, and every third year thereafter, in the month of April, the city council, by concurrent vote, the board of aldermen acting first, shall elect a solicitor for the city of Cambridge," etc. St. 1891, c. 364, § 20, as amended by St. 1907, c. 491. By the R. L. c. 26, § 7, it is provided that "no election of a city officer by a municipal body or board shall be valid unless made by a *viva voce* vote, each member who is present answering to his name when it is called by the clerk or other proper officer, stating the name of the person for whom he votes, or that he declines to vote."

The first objection of the petitioner to the election is that it was in violation of § 21 of the Joint Rules and Orders of the City Council, which provides that every ordinance and every order requiring concurrent action shall, after passing one board, remain in the possession of the clerk of that board for thirty-six hours. This is to give an opportunity for a motion for reconsideration, according to the later provision of the same section, and provisions on the same subject in § 18 of the Rules of the Board of Aldermen, and § 17 of the Rules of the Common Council. But these rules are not applicable to the election of a city solicitor, under the requirement of the statute. Such an election is not an ordinance or order, within the meaning of the rule. Section 21, after the requirement stated above, provides that if no motion for reconsideration is entered, the ordinance or order shall be sent to the clerk of the other board, who shall cause the same to be printed in a calendar, etc. In this case there was no ordinance or order. There was a vote upon an oral motion, in the board of aldermen, to proceed to the election of a city solicitor. Then an election was had in the manner prescribed by the statute. The result was recorded and notice of what had been done was sent to the common council. The proceeding is not within the definitions of orders and ordinances in §§ 1, 2 of the joint rules,* nor is it within the meaning and object of § 21. This objection of the petitioner is not well founded.

* The sections referred to are as follows:

"Section 1. All by-laws passed by the city council shall be termed

The next question arises upon proceedings after a motion to adjourn in the common council. The record is as follows:

"At this time Councilman Beane submitted a motion 'That the Common Council do now adjourn.'

"The President declared this motion to be carried, and immediately left the chair.

"The vote on this motion was doubted.

"Councilman Nelligan assumed the chair at once, and Councilman Murphy submitted a motion that Councilman Nelligan be chosen President temporarily.

"This motion was declared to be carried.

"On motion of Councilman Trodden, a committee consisting of Councilman Horan and Councilman Murphy was appointed to wait on the President and request him to resume his duties.

"This committee reported that they were unable to find the President.

"The aforesaid communication from the Board of Aldermen giving notice of the election of James F. Aylward as City Solicitor, was then read by the President *pro tempore*.

"Councilman Horan submitted a motion that the Common Council proceed to the election of a City Solicitor.

"This motion was declared to be carried.

"The roll of members was called by the clerk and each member present announced his choice for City Solicitor as follows:" Then follows the record of the vote of each member present, showing twelve votes for the respondent Aylward and two for the petitioner, and showing the names of the absent members, who were eight in number. Mr. Aylward was declared elected city solicitor, in concurrence with the board of aldermen, and notice was sent to that board.

The petitioner contends that the common council was adjourned, and that the subsequent proceedings were all invalid. We must construe the record as meaning that the vote to adjourn,

ordinances; and the enacting style shall be, 'Be it ordained by the city council of the City of Cambridge.'

"Sect. 2. In all votes, by which either or both branches of the city council express anything by way of command, the form of expression shall be, 'Ordered'; and whenever either or both branches express opinions, principles, facts or purposes, the form shall be 'Resolved.'"

as declared, was doubted without delay. Under § 2 of the Rules and Orders of the Common Council,* it is the duty of the president, in such cases, to resolve the doubt at once by requiring "the members voting in the affirmative and negative to rise and stand until they are counted." That would be his duty if there were no such rule. This president did not relieve himself of the duty by "immediately" leaving the chair. As he ceased to act as presiding officer, the members were obliged to choose some one else to act in his stead, and their choice of a president *pro tempore* was properly made. *Holt v. Somerville*, 127 Mass. 408, 411. *Bennett v. New Bedford*, 110 Mass. 433, 438. It is objected that this was illegal because § 1 of the rules declares that "in the absence of the president, the clerk, and in his absence, the senior member present, shall call the council to order, and preside until a president *pro tempore* is chosen by ballot." But this rule applies to the organization of a meeting in the absence of the president. It has no application to a case where the meeting is organized and doing business, and the president abandons his post, and leaves the meeting without a presiding officer. In such a case the meeting properly may choose a presiding officer in any reasonable way. The clerk may preside until the temporary president is chosen, or any member may do so. As soon as the temporary president was chosen, it was the duty of the meeting to resolve the doubt on the motion to adjourn, in accordance with the rule. In their method of doing this they did not follow the rule. But apparently by common consent, and without objection by anybody, they did resolve the doubt by proceeding to do business. This action was inconsistent with any other conclusion upon the motion to adjourn than that it was not carried.

* The sections referred to are as follows:

"Section 1. The president shall call the council to order at the hour to which it has adjourned, and a quorum being present, shall proceed to the regular order of business. In the absence of the president, the clerk, and in his absence, the senior member present, shall call the council to order, and preside until a president *pro tempore* is chosen by ballot. A plurality of votes shall elect.

"Sect. 2. The president shall declare all votes. If any member doubts the vote, the president, without further debate upon the question, shall require the members voting in the affirmative and negative to rise and stand until they are counted."

The president's declaration of adjournment had no effect to bring the meeting to an end when the vote declared was promptly doubted. The meeting continued without being adjourned, and took action which was equivalent to a decision that the motion to adjourn was not carried. *Baker v. Cushman*, 127 Mass. 105, 106. *Williams v. Gloucester*, 148 Mass. 256, 260. *Wood v. Milton*, 197 Mass. 531. While this was irregular, its meaning was plain, and seemingly, it was by the unanimous consent of all the members present. It was, therefore, as effectual as if it had been regular. See *Attorney General v. Remick*, 73 N. H. 25; *Hicks v. Long Branch*, 40 Vroom, 300, 303; *Putnam v. Langley*, 133 Mass. 204; *Wood v. Cutter*, 138 Mass. 149. *Wheelock v. Lowell*, 196 Mass. 220, 230. *Sinclair v. Mayor of Fall River*, 198 Mass. 248, 256.

The attempt to adjourn having thus been disposed of, the election was valid. It was agreed to, not only by a majority of the members present, but by a majority of the members of the whole common council. Even if there had been irregularities in the election itself, unless they were such as to defeat or render doubtful the expression of the will of the voters, the court would desire to give effect to the action of the majority. *Attorney General v. Campbell*, 191 Mass. 497, 502. *Blackmer v. Hildreth*, 181 Mass. 29, 32. *Commonwealth v. Smith*, 132 Mass. 289, 296. *People v. Wood*, 148 N. Y. 142.

As the respondent Aylward was legally elected, the right of the petitioner, who was holding over after the expiration of his term of office until his successor should be chosen, was thereby terminated.

Petition dismissed.

NANCY J. JONES, administratrix, vs. BOSTON AND NORTHERN
STREET RAILWAY COMPANY.

Essex. January 13, 1910. — February 28, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Negligence. Street Railway. Carrier, Of passengers.

In an action by an administrator against a street railway corporation under St. 1907, c. 392, for causing the death of the plaintiff's intestate while a passenger on a car of the defendant by reason of the negligence of a servant of the defendant, evidence offered by the defendant, to show that at the time of the accident the intestate was riding on the front platform of the car where printed notices were posted stating that passengers riding on the front platform did so at their own risk and that the intestate knew of the existence of these notices and had discussed their effect with the motorman, is not admissible, any lack of due care on the part of the intestate being immaterial, and the evidence having no tendency to show that the intestate was not a passenger and having no bearing on the degree of culpability of the defendant affecting the assessment of damages.

The provisions of St. 1907, c. 392, which impose a fine and civil liability upon a corporation operating a street railway for causing the death of a passenger by reason of the unfitness or negligence of its agents or servants while engaged in its business, are penal in their character and this liability of the corporation is not affected by the question whether the passenger was in the exercise of due care.

HAMMOND, J. This was an action of tort under St. 1907, c. 392, to recover damages for the death of the plaintiff's intestate while riding as a passenger in one of the defendant's cars, the accident causing the death being due to the negligence of a servant of the defendant.

At the trial the defendant offered to show by the testimony of the motorman of the car that during the twelve years in which he had operated a car upon the defendant's line, the intestate had been a constant patron of the defendant; that he rode almost every day; that he always rode upon the front platform even when there was plenty of room inside the car; that for more than a year before the accident there had been in the defendant's cars, including the car on which the intestate was riding, upon either side of the middle window in front of the vestibule and upon either side of the door opening from the vestibule into the car, printed notices of the following tenor, "Passengers riding on the front platform do so at their own

risk"; that shortly after the posting of these notices the intestate discussed them with the witness, saying, "They don't amount to much anyway," to which the witness replied, "I suppose the road would not have put them up unless it thought they amounted to something." The defendant produced parts of the car on which the intestate was riding, showing these notices and offered them in evidence.

The judge * ruled that the evidence offered was incompetent and immaterial and excluded it; to which ruling the defendant excepted.

The only question is whether the evidence was admissible. It was not admissible upon the question of the due care of the intestate because the lack of due care on his part was not material, the statute being of a penal nature. *Commonwealth v. Boston & Lowell Railroad*, 134 Mass. 211. *Merrill v. Eastern Railroad*, 139 Mass. 252. *Hudson v. Lynn & Boston Railroad*, 185 Mass. 510. Nor was it admissible to prove the terms of the contract of carriage. It had no tendency to prove that the intestate was not a passenger. The defendant could not by a contract made in advance exempt itself from the penalties of the statute. *Commonwealth v. Vermont & Massachusetts Railroad*, 108 Mass. 7. *Doyle v. Fitchburg Railroad*, 162 Mass. 66, 71. See also *Hudson v. Lynn & Boston Railroad*, *ubi supra*, and cases cited.

Nor was it admissible upon the question of the degree of culpability. It had no bearing as to any physical circumstance to which the accident was in any part due nor upon the degree of care due from the defendant.

Exceptions overruled.

The case was submitted on briefs.

J. P. Sweeney & L. S. Cox, for the defendant.

W. H. Niles & H. R. Mayo, for the plaintiff.

* Fox, J.

FRED S. SACKETT vs. CLIFFORD B. SANBORN.

Norfolk. January 13, 1910. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Police. Officer. Witness, Fees in criminal cases.

Whether a police officer of a town, who is entitled to witness fees under R. L. c. 204, § 44, for attending as a witness in criminal cases at a place other than his residence, can recover such fees in an action against the clerk of the court in which the cases were tried, or whether he should bring his action against the town, here was not determined, because the plaintiff was held to be entitled to no fees.

Under R. L. c. 204, §§ 42, 44, the chief of police of a town, who is receiving a salary as such chief and as a police officer and whose duty it is to be the prosecuting officer for the town and to have charge of all criminal complaints and to prosecute offenders, is not entitled to witness fees for attendance "as a witness at a place other than his residence" in cases which it is his duty to prosecute.

Whether under the provision of R. L. c. 204, § 44, that any of certain officers attending court "as a witness at a place other than his residence" shall be allowed a witness fee, which applies only to such attendance as is outside the performance of the duties for which such officer is paid, a police officer of the town of Dedham, who resides in the town of Norwood, when attending as a witness at the District Court of Northern Norfolk, which sits at Dedham and includes in its jurisdiction the town of Norwood, is attending "as a witness at a place other than his residence," here was not determined, because the attendance of the plaintiff was in the performance of the duties which he was paid a salary for performing, so that he was not entitled in any case to recover under the statute.

MORTON, J. The defendant is the clerk of the District Court of Northern Norfolk which sits at Dedham and includes within its jurisdiction the town of Norwood, where the plaintiff resides and of which he is the chief of police and a police officer. This action is brought for the purpose of recovering from the defendant witness fees and travel for attendance by the plaintiff as a witness at said court in Dedham, in various criminal cases. The case was referred to an auditor whose findings of fact are, by agreement of parties, final. The auditor found that the plaintiff was not entitled to recover either for witness fees or for travel. The case was tried on the auditor's report, without a jury, by the Chief Justice of the Superior Court, who made a general finding in favor of the defendant and thereupon reported the case to this court. If the finding is

correct, judgment is to be entered for the defendant; otherwise such judgment is to be entered as this court may determine.

We think that the finding was correct. It is doubtful whether, assuming that the plaintiff was entitled to witness fees and travel, the action is maintainable against this defendant, and whether it should not have been brought against the town of Norwood. R. L. c. 204, § 45; c. 160, § 48. That question has not been raised by the parties because they wished to obtain the opinion of the full court on the construction of the statute. With some hesitation we proceed to deal with that question. The plaintiff contends that he is entitled to witness fees and travel for attendance at the District Court under R. L. c. 204, § 44.

The auditor finds that during the time covered by the declaration the plaintiff was chief of police and a police officer of the town of Norwood, and received a regular salary for his services as such chief of police and police officer. He also finds that in nearly all of the cases set out in the declaration the plaintiff made out the complaint, and, in most of the cases where an arrest was made, made the arrest and was present as complainant or prosecuting officer at the District Court at Dedham when the several cases were heard. The by-laws and police regulations of the town of Norwood require, amongst other things, that the chief of police shall "be the prosecuting officer of the department and shall have charge of all complaints and shall use his best efforts to prosecute offenders."

R. L. c. 204, § 42, provides that "No officer in attendance on any court, sheriff, deputy sheriff, jailer, constable, city marshal or other police officer who receives a salary or an allowance by the day or hour from the Commonwealth or from a county, city or town shall, except as otherwise hereinafter provided, be paid any fee or extra compensation for official services performed by him in any criminal case; . . . but his expenses, necessarily and actually incurred, and actually disbursed by him in a criminal case tried in the Superior Court, shall be paid by the county in which the trial is held, and in a criminal case tried in a police, district or municipal court or before a trial justice, by the city or town in which the crime was

committed." Any officer violating the provisions of this section is liable to a fine of \$100. The plaintiff was receiving a salary as chief of police and as a police officer of the town of Norwood, and was attending the District Court in the performance of his official duties as such chief of police and police officer in criminal cases when he claims to have been entitled to witness fees and travel. The case comes therefore plainly within the statutory provision quoted above unless the words "except as otherwise hereinafter provided" point to a qualification which constitutes an exception in the plaintiff's favor. The plaintiff contends that they do, and that the provision in § 44 of the same chapter that "Any officer named in section forty-two who attends as a witness at a place other than his residence, shall, instead of his expenses, be allowed by the day the witness fee in the court or before the trial justice where he testifies" is the provision referred to, and that under it he is entitled to the witness fees and travel which he seeks to recover in this action. We do not think that the construction thus contended for is the correct one. The object of the statute is to provide that officers who receive compensation for their services by salary or otherwise, and attend court in the discharge of duties which they are thus paid to perform, shall not receive further compensation by way of witness fees, but that any expenses necessarily and actually incurred or disbursed by them in the performance of such duties in attending court in criminal cases shall be reimbursed to them. If they attend court, but not in the performance of the duties for which they are paid, at a place other than their residence, then, according to the provision quoted above from § 44, instead of their expenses they are to be allowed witness fees. The proviso in § 42 was inserted simply as a matter of precaution, for the purpose of making it plainer, if possible, that the provisions of that section were not intended to apply to the cases thus included and provided for in § 44. It was not intended to enlarge and does not enlarge the scope and effect of the provisions contained in § 42. As thus construed §§ 42 and 44 are entirely consistent with each other and the legislative intent is given full effect. This construction renders it unnecessary to consider the question which has been raised

whether attendance at the court at Dedham was as matter of law attendance by the plaintiff at a place other than his residence.

It follows that according to the terms of the report judgment must be entered for the defendant.

So ordered.

S. R. Cutler, for the plaintiff.

J. H. Soliday, for the defendant.

WILLIAM J. WELCH vs. JABEZ FOX.

Suffolk. January 13, 1910. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Guardian, Ad litem. Prohibition. Jurisdiction.

It is the duty of a court, in which proceedings are pending, to appoint a guardian *ad litem* whenever a party to the proceedings by reason of minority or mental unsoundness requires such representation, and the court has jurisdiction to consider and decide the question whether such a guardian is required.

A writ of prohibition is granted only to restrain a tribunal from acting in matters outside its jurisdiction, and does not lie to correct the errors of a tribunal acting within its jurisdiction.

Where a court in which proceedings are pending exercises its jurisdiction by appointing a guardian *ad litem* for one of the litigants, and such appointment is irregular or informal for want of a previous notice to the litigant to appear and show cause why such a guardian should not be appointed or for any other reason, the remedy for the correction of the error is not by a writ of prohibition but by appeal or exception or in some cases by a writ of certiorari.

PETITION, filed on March 19, 1909, for a writ of prohibition addressed to Justice Jabez Fox of the Superior Court to enjoin him from appointing a guardian *ad litem* for the petitioner in the case of William J. Welch v. H. Lincoln Chase and others pending in that court.

The case was heard by *Braley, J.*, upon the pleadings and an agreed statement of facts. It appeared, among other matters, that on March 9, 1909, the respondent, in denying a motion made by the petitioner for a new trial or rehearing of an application made by him for a writ of review, filed the following memorandum:

"The plaintiff is a member of the bar and appears in his own behalf without the assistance of other counsel. The petition for a retrial of the application for a writ of review and the plaintiff's statements in support of it (a stenographic report of which is filed herewith) make it clear that the plaintiff is mentally unsound and that further proceedings ought not to be taken until a guardian *ad litem* has been appointed. No action upon the petition for retrial and upon the plaintiff's bill of exceptions now pending will be taken until such guardian has been appointed. The guardian should be a responsible attorney or he should be represented by a responsible attorney in future proceedings."

The petitioner asked the justice to rule that on the pleadings and the agreed statement of facts a writ of prohibition should issue as matter of law. The justice refused to make this ruling, and ordered that the petition be dismissed. The petitioner alleged exceptions.

W. J. Welch, pro se.

F. G. Katzmann, (P. O'Loughlin & H. M. Channing with him.) for the respondent.

HAMMOND, J. The petitioner has mistaken his remedy. No citation of authorities is needed in support of the propositions, first, that a court may, and indeed should, appoint a guardian *ad litem* for a litigant in a case before it whenever by reason of minority or mental unsoundness one is required; and second, that whenever the question arises as to whether such a guardian is required the court has jurisdiction to consider and decide it. And this jurisdiction is not founded upon a previous notice to the litigant, but is a part of and incidental to its general jurisdiction over the case and the parties properly before the court. *Denny v. Denny*, 8 Allen, 311. If in the exercise of this jurisdiction the proceedings of the court are irregular or informal for want of a previous notice to the litigant to appear and show cause why such a guardian should not be appointed, or for any other cause, the remedy for the correction of any such error is not by a writ of prohibition but by appeal or exception, or in some cases by writ of certiorari. Prohibition lies not to correct errors of a tribunal acting within its jurisdiction, but to restrain it from acting in matters outside of its jurisdiction. "The writ

is not to be granted to restrain a tribunal which, having jurisdiction of a cause, is merely proceeding in it improperly; and it will not be granted if the court has jurisdiction." Barker, J., in *Hyde Park v. Wiggin*, 157 Mass. 94, 99. See also that case and the cases therein cited, for further discussion of the office of this writ.

It becomes unnecessary to consider the other grounds of defense to the petition. The petition was rightly dismissed.

Exceptions overruled.

MATTI RINTAMAKI vs. CUNARD STEAMSHIP COMPANY,
LIMITED.

Suffolk. January 13, 1910. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Agency, Scope of apparent authority. Evidence, To show apparent authority.

In an action by a native of Finland against an ocean steamship company for a sum of money entrusted to an employee of the defendant for transmission to a person in Finland, it appeared that the employee of the defendant to whom the money was entrusted appropriated it to his own use and shortly afterwards disappeared. The plaintiff had been in this country about ten years and could not read, write or speak English. The employee of the defendant to whom the plaintiff entrusted the money also was a Finn, and the plaintiff had known him for about four years, having met him first at the defendant's office, when the plaintiff went there with a friend who had business with the defendant. At the time of entrusting the money the plaintiff went into a basement office at the defendant's principal place of business in this Commonwealth, where the defendant's name was displayed and where also was a notice that foreign money orders were for sale. Inside the office was a counter behind which were five persons, all at desks, one of whom was the Finnish employee. The plaintiff addressed himself to this employee, and explained to him that he wished to send the sum of money to a certain person in Finland. The employee undertook in behalf of the defendant to send the money for the plaintiff and said, "In between six and seven weeks, if the money should not reach Finland, you could come here in this office and get your money back." Thereupon the plaintiff told the employee where to send the money and counted it out to him, and the employee gave the plaintiff a receipt for the money on a memorandum form of the defendant signed in his own name. The business was conducted openly before the other persons present. There was evidence that the Finnish employee, with the approval of a person who was or represented himself to be the defendant's agent, previously had acted for the defendant in forwarding to a person in Finland tickets from Finland to America and that his letters in this transaction were copied in the letter

books in the defendant's office, also that an advertisement in Finnish had been inserted by the defendant in a newspaper in another city which referred to the employee in question in connection with the defendant's passenger business from Finland as "Manager of the Finnish department." The head of the department in which this man was employed testified on cross-examination that the defendant sometimes sent tickets to Finland for Finnish customers, and that if a Finnish customer came in, the business, whether relating to the sale of tickets or drafts, ordinarily would be turned over to the defendant's Finnish representative and that he himself would not appear in it at all. *Held*, that as between the plaintiff and the defendant the actual authority of the employee to whom the plaintiff entrusted the money was immaterial, if the defendant suffered him to exercise an authority which he did not in fact possess or negligently failed to prevent him from doing so and the plaintiff thereby was led to deal with him as with one having the authority which he purported to have; and that there was evidence warranting a finding that the defendant's employee in receiving the plaintiff's money was acting within the scope of his apparent authority as agent of the defendant and that the plaintiff was justified in dealing with him accordingly.

In an action to recover the amount of a sum of money which was entrusted by the plaintiff to an employee of the defendant, who professed to receive it as the agent of the defendant for transmission to a foreign country, where the case of the plaintiff depends on his showing that the employee of the defendant to whom he entrusted the money was acting within the scope of his apparent authority as agent of the defendant, evidence of the history of the transaction, including the receipt in writing for the money given to the plaintiff by the employee whose apparent authority is in question, and evidence tending to show that such employee was undertaking to act as agent of the defendant and not on his own account, including his card which he gave to the plaintiff at the defendant's office with the name and address of the defendant upon it below his own name, are pertinent and competent. So also evidence, that such employee made use of the defendant's letter book to copy letters written by him in regard to a previous transaction with another person in which he had undertaken to act for the defendant, properly may be admitted as bearing, although slightly, on the scope of the apparent authority of the employee and on the defendant's means of knowledge in regard to such apparent authority.

MORTON, J. The plaintiff brings this action to recover from the defendant money received by it, according to the first count, for the plaintiff's use, and, according to the second count for the same cause of action, for breach of contract to convey to one Sinkonen, in Finland, pursuant to a receipt a copy of which is annexed to the declaration, money delivered by the plaintiff to the defendant for that purpose. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to a refusal of the presiding judge* to give certain rulings and to the admission of evidence.

* The case was tried before *Bishop, J.* After his death the exceptions were allowed by *Pierce, J.*

The money was delivered by the plaintiff to one Carl Blomquist, an employee of the defendant, who appropriated it to his own use and shortly after disappeared. The principal question is whether there was evidence warranting a finding that in receiving the money Blomquist was acting within the scope of his apparent authority as agent of the defendant, and whether the plaintiff was justified in dealing with him accordingly. We think that there was evidence warranting such a finding.

It was not contended at the trial that Blomquist was expressly authorized by the defendant to receive money from the plaintiff and forward it to Finland, as he undertook to do; and the court instructed the jury in so many words that they were to "start in this case with the proposition that there was no express authority from the Cunard Company to Blomquist to take the plaintiff's money and send it to Finland." No question of express agency is therefore before us. So far as any instructions were requested by the defendant in relation to that matter the ruling of the judge was in its favor and no exception lies thereto.

As we have said, the principal question relates to the matter of Blomquist's apparent authority as distinguished from his actual or express authority. The question whether one is acting within the apparent scope of his authority as agent for another is usually one of fact, the answer to which depends on the inference to be drawn from a variety of circumstances relating to the conduct of the apparent agent, and the knowledge or means of knowledge of the alleged principal of what is claimed to have been done in his behalf. If the circumstances are such by reason of the acquiescence or negligence of the alleged principal, or by reason of the nature of the duties entrusted to the supposed agent, and the situation in which the alleged principal has put him, as to warrant third parties in the exercise of a reasonable prudence and discretion in dealing with him as having authority to represent the alleged principal in regard to the transaction in question, then such principal will be bound; otherwise not.

The plaintiff was a Finn who had been in this country about ten years. He could neither read, write nor speak English. He had known Blomquist, who also was a Finn, about four years, "having first met him at the defendant's office, when he went

there with a friend who had business with the company." At the time of the transaction in question he went into one of the offices of the defendant company where Blomquist was. The company's principal place of business in this Commonwealth was then at 126 State Street, and the office into which the plaintiff went was there. The office was a basement office, and on the door leading down to it were the words, "Cunard Line. Second Cabin. Third Class. Steerage. Drafts," with a hand pointing down the stairs to the office. On the windows of the office facing State Street and on the wall facing the foot of the stairs were the words, "Cunard Line. Money orders for £1 and upwards, payable free of discount at Ireland, England, Scotland and Wales, for sale here." Inside the office was a counter behind which were five persons, including Blomquist, all at desks. There was nothing to indicate the scope of the duties of the different persons behind the counter, or to show that any one visiting the office could not transact his business with either of the persons behind the counter. The plaintiff naturally addressed himself to Blomquist, to whom he had previously spoken about sending money to Finland, and who had told him that "Our company sends money just as well as any other company, and you get the most for your money sending it through England," and explained what he wanted to do which was to send \$450 to Elias Sinkonen in Finland. In reply Blomquist told the plaintiff, as he had before, "Our company would send money to Finland same as all the other companies do, if you want to send money to Finland. In between six and seven weeks, if the money should not reach Finland, you could come here in this office and get your money back." Thereupon the plaintiff told Blomquist where to send the money and counted out the \$450 to him, and Blomquist gave him a receipt therefor on a memorandum form of the defendant company signed in his own name. The business was conducted openly, and, as the jury could properly have found, without anything in the attendant circumstances to put the plaintiff on his guard or to show that he acted otherwise than as a reasonably prudent man would have done. Indeed considering the well known nature of the defendant's business, it would have been surprising if a person in the plaintiff's apparent station in life, seeing Blomquist in the office and behind the counter,

would not have concluded almost inevitably that he was authorized to represent the company in any business which he assumed to transact with him. As was said in *Newman v. British & North American Steamship Co.* 113 Mass. 362, 365: "Persons having business at that office could not be expected to call for proof of the authority of clerks and agents whom they find there acting as such, but must trust to appearances, and to the not unreasonable assumption that the defendants would not permit unauthorized persons to be so engaged."

In regard to Blomquist's apparent authority there was evidence tending to show that on a previous occasion another person had gone to the defendant's third cabin department and had been turned over by some one who either was or represented himself to be Mr. Martin, the defendant's agent, to Blomquist to transact her business with, and that she had given Blomquist \$20 and had purchased two and a half tickets from Finland to America, to be sent to her brother in Finland, and that the brother had received the money and the tickets. There was also evidence that Blomquist's letters forwarding the tickets and money were copied into the letter books in the office. All of this evidence was excepted to, but was admissible as bearing directly on Blomquist's authority and the defendant's knowledge of what Blomquist had done. There was likewise evidence of an advertisement in Finnish inserted by the defendant in a Fitchburg paper in which Blomquist was referred to in connection with the passenger business from Finland as "manager of the Finnish department." This also was excepted to but was plainly admissible. The manager of the department in which Blomquist was employed testified, in substance, on cross-examination by the plaintiff, that they sometimes sent tickets to Finland for Finnish customers, and that if a Finnish customer came in, the business, whether relating to the sale of tickets or drafts, ordinarily would be turned over to the company's Finnish representative and he himself would not appear in it at all. There was other evidence which it was contended by the plaintiff tended still further to show that Blomquist had apparent authority to do what he did.

Evidence of a contradictory nature was introduced by the defendant. But we do not think it necessary to go into the evidence more in detail. The question is not as to the weight of the evi-

dence but whether there was any evidence warranting a finding by the jury that in receiving the plaintiff's money to send to Finland Blomquist was acting within the apparent scope of his authority, and whether the plaintiff was justified in dealing with him accordingly. We think, as already observed, that it is clear that there was evidence warranting such a finding. As between the plaintiff and the defendant it is immaterial what the extent of Blomquist's actual authority was if the defendant suffered him to exercise an authority which he did not in fact possess, or negligently failed to prevent him from doing so and the plaintiff was thereby led to deal with him as one having the authority which he purported to have. The defendant relies on *Burroughs v. Norwich & Worcester Railroad*, 100 Mass. 26. But there were no such circumstances in that case, as there are in this, to show that the agent was acting within the scope of authority apparently conferred upon him by his principal.

Some of the evidence which was admitted subject to the defendant's exception has already been referred to. We see no error in regard to other evidence which was similarly admitted. It was all pertinent and competent either, as in the case of the receipt, as part of the history of the transaction, or, as in the case of Blomquist's card,* as tending to show that Blomquist was acting as agent for the defendant and not on his own account, or, as in the case of untranslated letters in Finnish, to show that Blomquist was using the defendant's letter book, and as thus bearing, though slightly, on the extent of his apparent authority, and the defendant's knowledge or means of knowledge in relation thereto.

Exceptions overruled.

J. L. Putnam, for the defendant.

W. W. Stover, for the plaintiff.

* The portion of the bill of exceptions relating to the admission of this card in evidence was as follows: "The plaintiff offered in evidence a card given him by Blomquist at the defendant's office, which reads 'Carl Blomquist,' and Finnish words which the interpreter translated as 'Taking in Finnish cases and looking after Finnish business. Cunard Steamship Co., State Street, Boston.' This was admitted at the end of all the evidence subject to the defendant's exception."

STEWART M. ANDREWS vs. MINES CORPORATION, LIMITED,
& another.

Suffolk. January 13, 14, 1910. — February 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Mandamus. Practice, Civil, Report by judge. Corporation, Foreign, Inspection of books by stockholder.

Where a petition for a writ of mandamus comes before a single justice of this court, who after a hearing orders that the writ should issue, but at the request of the respondents reports the case for decision by the full court, the report brings before this court only questions of law, and the decision of the single justice must be given effect unless some error of law appears, the proceeding being one at law and not in equity.

The right of a stockholder in a corporation to inspect its books and records for good reasons and under proper conditions, which was recognized and enforced by this court in *Varney v. Baker*, 194 Mass. 239, will be enforced in this Commonwealth against a corporation organized in another State, when its books and the officer having custody of them are here and it has a usual place of business in Massachusetts.

Where at the hearing upon a petition for a writ of mandamus against a corporation to enforce the plaintiff's right to inspect the books and records of the respondent for good reasons and under proper conditions, if the petitioner shows that he asked the president of the respondent and also its treasurer, who was the custodian of the books, to be allowed to inspect them, and that the books and records on one occasion were taken from the petitioner's possession by force after he had begun to examine them, it cannot be said as matter of law that the petitioner did not make a sufficient effort to obtain the books for examination before filing his petition.

A writ of mandamus is the proper remedy to enforce the right of a stockholder in a corporation to inspect its books and records for good reasons and under proper conditions.

KNOWLTON, C. J. This is a petition for a writ of mandamus upon which a justice of this court,* after a hearing, entered an order that the writ should issue, and then, at the request of the respondents, reported the case to this court. As the proceeding is at law, such a report brings before us only questions of law, and the decision of the single justice must be given effect unless some error of law appears.

The petitioner is a stockholder in the respondent corporation, and his petition is that the corporation and the other respondent,

* Morton, J.

who is a director and the treasurer of the corporation, having custody of its books and records, be directed to give him an opportunity to examine these books. The petitioner is a citizen of this Commonwealth, and the respondent corporation, which is organized under the laws of the State of Delaware, has a usual place of business in Boston and holds its meetings there. Its books and records are there in the hands of Davison, the other respondent. The president of the corporation also resides in this Commonwealth.

The right of a stockholder in a corporation to inspect its books and records for good reasons, and under proper conditions, was considered at length in *Varney v. Baker*, 194 Mass. 239. The principal question in the present case is whether this right will be enforced in this Commonwealth against a foreign corporation and its officers, when its books and the officer having the custody of them are here, and when it has a usual place of business in Massachusetts. The circumstances of the present case call for the exercise of this jurisdiction, if it ever can properly be exercised.

It has often been decided that this court will not take jurisdiction, in ordinary cases, to regulate the internal affairs of a foreign corporation which ought to be managed under the laws and by the direction of the courts of the State or country where it is organized. *Smith v. Mutual Life Ins. Co.* 14 Allen, 336. *Williston v. Michigan Southern & Northern Indiana Railroad*, 13 Allen, 400. *Kansas & Eastern Railroad Construction Co. v. Topeka, Salina & Western Railroad*, 135 Mass. 34, 40. *Kimball v. St. Louis & San Francisco Railway*, 157 Mass. 7. *Wason v. Buzzell*, 181 Mass. 338. *Electric Welding Co. v. Prince*, 195 Mass. 242, 256. But the right which is sought to be enforced here is one of general, if not universal, recognition from early times. It is referred to in different cases as a right existing at common law. In order to enforce it, the court is not called upon to investigate the internal affairs of the corporation, or to make any order that affects it in the management of its business, or in the relations of stockholders to one another. By virtue of the laws which permit the corporation to do business in this Commonwealth and subject it to the jurisdiction of our courts, any proper jurisdiction may be exercised which concerns its dealings with third parties here whereby their rights are affected.

Rights of third parties, whether they happen to be stockholders or not, if the rights are such as are recognized by our laws, may be enforced by our courts, unless they relate to such internal affairs of the corporation as ought to be regulated only by the courts of the State or country to which it owes its existence. Where all that is desired is an examination of books, and the corporation has a usual place of business in this Commonwealth, and the books and their custodian are here, there is every reason of policy and convenience why our courts should enforce a stockholder's right to examine them. This conclusion has been reached in carefully considered opinions of courts in other States. *Richardson v. Swift*, 7 Houst. (Del.) 137. *State v. North American Land & Timber Co.* 106 La. Ann. 621. *State v. Lazarus*, 127 Mo. App. 401. That there was jurisdiction in such a case was assumed, both by counsel and the court, in *Schondelmeyer v. Columbia Fire Proofing Co.* 219 Penn. St. 610, although the writ of mandamus was refused on the ground that the facts did not show a need of relief. The only case to the contrary that has come to our attention is *In re Rappleye*, 43 App. Div. (N. Y.) 84. That was decided in New York, where there are statutory provisions for the keeping of certain books in that State by foreign corporations doing business there, to which stockholders shall have access. This case did not come within the statutes, and the existence of such statutes may have been a reason for the decision, although the judges did not say so. We see no good reason why this jurisdiction should not be exercised in this Commonwealth in a proper case.

The findings of fact by the presiding justice bring the application within the principles stated in *Varney v. Baker*, 194 Mass. 239, and the findings seem to be well supported by the other facts and the evidence reported.

It cannot be said as a matter of law that the petitioner did not make a sufficient effort to obtain the books for examination before bringing the suit. He inquired of the president, and of Davison, the treasurer and custodian of the books, besides one or two other stockholders. The books and records were taken from his possession by force on one occasion, after he had begun to examine them. The decision in *Dunphy v. Traveller Newspaper Association*, 146 Mass. 495, is not applicable.

There is no ground for a contention that the relief to the petitioner should be in equity. The case of *Post & Co. v. Toledo, Cincinnati, & St. Louis Railroad*, 144 Mass. 341, shows the importance of sometimes taking jurisdiction in aid of, or against a foreign corporation; but the remedy there given in equity was of a different kind from that sought in the present case, and could not have been obtained upon a writ of mandamus. On the other hand, a writ of mandamus is a proper remedy in a case like the present.

Peremptory writ of mandamus to issue.

S. Lewenberg, for the petitioner.

J. S. Allen, Jr., (*W. N. Buffum* with him,) for the respondents.

COMMONWEALTH vs. LEVI GREENWOOD.

Norfolk. January 17, 1910. — February 23, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Intoxicating Liquors. Cider. Words, "Wholesale."

At the trial of a criminal complaint which charged the defendant with maintaining a nuisance in using a tenement for the illegal sale and keeping for sale of intoxicating liquors, there was evidence which tended to show that as a part at least of his regular business of manufacturing cider the defendant had made in his mill sales of cider in small quantities of less than a gallon and of more than the strength prohibited by R. L. c. 100, § 1; St. 1903, c. 460, § 1. *Held*, that a verdict of guilty was warranted.

The words "sales of cider at wholesale," as used in R. L. c. 100, § 1, as amended by St. 1903, c. 460, § 1, which exempt from the provisions of the statute prohibiting certain sales of spirituous or intoxicating liquors "sales of cider at wholesale by the original makers thereof," in the absence of a special definition of its meaning by the Legislature, must be construed, as directed by R. L. c. 8, § 4, cl. 8, according to the common and approved usage of the language, and therefore must mean sales made in large quantities as distinguished from those made in small quantities, which are to be regarded as sales at retail; and therefore it is error for a judge presiding at the trial of a criminal complaint, where the defendant is charged with selling cider illegally and contends that his sales were not illegal because they were made at wholesale, to instruct the jury that a sale made to a purchaser for his own consumption and not to sell again is a sale at retail, whether it is made in quantity of one gallon or more, and that a sale at wholesale is a sale made to one who has the real or at least the apparent purpose to sell again to his customers. In such a case the jury should be instructed

that, in determining the question of fact whether the sales made by the defendant were sales at wholesale, besides considering all the evidence with regard to individual sales testified to by the witnesses, they should bear in mind that sales at retail are sales made in small quantities such as are adapted to the wants of individual purchasers, while sales at wholesale are sales made in large quantities, such as commonly would be beyond the needs or desires of ordinary customers.

COMPLAINT, received and sworn to in the District Court of Northern Norfolk on February 22, 1908, charging the defendant with maintaining a nuisance in using a tenement in Norwood for the illegal sale and illegal keeping for sale of intoxicating liquors.

On appeal to the Superior Court, the case was tried before, *Lawton, J.* The defendant manufactured cider in a cider mill back of his house from apples which he purchased. The alleged illegal sales were made in the cider mill. Other facts are stated in the opinion. The jury found the defendant guilty; and the defendant alleged exceptions.

J. J. Feely, (R. Clapp with him,) for the defendant.

A. F. Barker, Assistant District Attorney, for the Commonwealth.

SHELDON, J. It is provided by statute that the prohibition to sell intoxicating liquors shall not apply to "sales of cider at wholesale by the original makers thereof." R. L. c. 100, § 1. St. 1903, c. 460, § 1. Whether the sales made by the defendant were unlawful, and so brought his tenement within the terms of R. L. c. 101, § 6, might be found to depend upon whether those sales were made at wholesale or at retail.

There was evidence which would have warranted a finding that the defendant had made, as at least a part of his regular business, sales of cider of more than the prohibited strength, in small quantities of less than a gallon, and properly could be convicted even under his contention that his sales had been only of one gallon or more. Nor do we consider that there is any peculiar sanctity in the quantity of one gallon. He might be convicted although none of his sales had been of a smaller amount than that. See *Pence v. Commonwealth*, 6 Ky. Law Rep. 113, 115. It follows that the case rightly was submitted to the jury. But it remains true that the jury may have agreed with his contention, and may have based their verdict of guilty simply upon the in-

struction that a sale made to a purchaser for his own consumption and not to sell again is a sale at retail, whether it is made in quantity of one gallon or more, and that a sale at wholesale is a sale made to one who has the real, or at least the apparent, purpose to sell again to his own customers.

The Legislature has not defined the sense in which it used the word "wholesale" in this statute. We therefore must apply the rule given in R. L. c. 8, § 4, cl. 3: "Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such meaning."

There is authority for the rule of construction which was given to the jury. It is supported by *State v. Tarver*, 11 Lea, 658; *Webb v. Baird*, 11 Lea, 667; *Harrison v. State*, 96 Tenn. 548; *Thibaut v. Kearney*, 45 La. Ann. 149, and 18 L. R. A. 596. It seems to have been one of the considerations in the mind of the court in *Faukner v. Lew Smith Wall Paper Co.* 88 Iowa, 169. It is embodied in the definition given in 30 Am. & Eng. Encyc. of Law, (2d ed.) 518. It is included in the definition given by Bouvier to the words "wholesale price," though not in his definition of the word "wholesale" itself.

The distinction between wholesale and retail dealers sometimes has been said to be that the former sell to the latter, while the latter sell to the general public in quantities to suit customers. *People v. Platt*, 92 Hun, 349. *Thibaut v. Dymond*, 37 La. Ann. 902, 903. *Koenig v. State*, 47 Am. St. Rep. 35. But see *People v. Abraham*, 16 App. Div. (N. Y.) 58; *Thibaut v. Kearney*, 18 L. R. A. 596.

In *Tripp v. Hennessy*, 10 R. I. 129, the defendant had a license which authorized him to sell liquors at retail only. He sold to one customer ten gallons of whiskey, which he drew from a cask containing more than that quantity. It was held as matter of law that this was a sale at retail and not at wholesale, because the original parcel which the defendant had bought was opened up and divided so as to take out and sell a smaller quantity therefrom. The same view was taken in *Gorsuth v. Butterfield*, 2 Wis. 237.

But on the weight of authority the more important distinction

between the wholesale and the retail dealer is that the former's dealings are with goods in large quantities, by the package or piece, while the latter sells in small quantities or parcels. This is the substance of the definitions given by Webster and by Worcester and in the Century Dictionary and by Bouvier. The Century Dictionary clearly illustrates the distinction by a quotation from Spencer's Principles of Biology, § 176: "Articles which the consumer recognizes as single the retailer keeps wrapped up in dozens, the wholesaler sends the gross, and the manufacturer supplies in packages of a hundred gross." It has been so held in many cases. *State v. Kirkham*, 23 N. C. 384, 385. *State v. Cassety*, 1 Rich. Law, 90, 91. *State v. Mooty*, 3 Hill, (S. C.) 187, 189. *McArthur v. State*, 69 Ga. 444, 445. *Markle v. Akron*, 14 Ohio, 586, 592. *State v. Lowenhaught*, 11 Lea, 13, approved in *Webb v. State*, 11 Lea, 662. *Bridges v. State*, 37 Ark. 224, 226. 24 Am. & Eng. Encyc. of Law, (2d ed.) 875.

In our opinion that rule has been adopted in this Commonwealth. It was said by Dewey, J., in *Commonwealth v. Kimball*, 7 Met. 304, 308: "To retail is to sell in small quantities. To retail to any particular individual is to sell to him in a small quantity." The original statute of which, with the numerous amendatory acts, R. L. c. 100, is a codification, was passed in 1875, being c. 99 of the acts of that year. The particular provision which is before us appears first in St. 1894, c. 489. We must suppose that in using the word "wholesale," which has since been retained in the statute, the Legislature had in mind the language of Mr. Justice Dewey; (*Low v. Blanchard*, 116 Mass. 272; *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 193; *Commonwealth v. Taylor*, 132 Mass. 261, 262;) and intended that the words "sales at wholesale" should be taken to mean sales made in large quantities, as distinguished from those made in small quantities, which were to be regarded as sales at retail. So in *Commonwealth v. Poulin*, 187 Mass. 568, the language of Dewey, J., above cited was quoted with approval, and it was held that a sale of a quart of native wine could not be found to be a sale at wholesale within the meaning of R. L. c. 100, § 1.

In our opinion the jury should have been instructed that in determining the question of fact whether the sales made by the

defendant were sales at wholesale, besides considering the other points to which their attention was called by the trial judge,* they should bear in mind that sales at retail are sales made in small quantities such as are adapted to the wants of individual purchasers, while sales at wholesale are sales made in large quantities, such as ordinarily would be beyond the needs or desires of ordinary consumers. We do not mean to say that the apparent purpose with which purchases are made would not be an important circumstance in this connection. It might be the case that one who bought for the purpose of selling again would desire to buy a larger quantity than one who was purchasing for his own consumption; and the attention of the jury properly might be called to this, as well as to all the other circumstances of whatever sales might be in evidence; but the decisive point is the quantity sold rather than the purpose of the purchaser.

The other questions presented by the bill of exceptions may not be raised again in the same manner, and we do not deem it necessary to pass upon them, especially as the district attorney seems to have overlooked them and has not argued them in his brief.

Exceptions sustained.

COMMONWEALTH vs. WILLIAM C. HOWARD.

Bristol. January 17, 1910. — February 23, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Homicide. Pleading, Criminal, Bill of particulars. Practice, Criminal, Motion to dismiss indictment, Motion to quash indictment, Opening statement to jury, Judge's charge. Evidence, Judicial notice, Relevancy and materiality, Remoteness, Affecting credibility of witness. Witness, Impeachment.

Three counts in an indictment for murder respectively charged as the means by which the murder was committed that the defendant "with his hands or some instrument to the jurors unknown did choke and strangle" a certain woman, "did throw and push her into a certain river by means of which throwing and pushing she . . . was . . . drowned," and "with his hands or some instrument to the jurors unknown, or by some other means to the jurors unknown, did suffocate her." The defendant moved that the Commonwealth be ordered to

* Evidence as to different sales testified to by the witnesses for the Commonwealth.

file a bill of particulars under each count setting forth in detail the time and place of the alleged crime and "the manner and means by and in which" the crime "is alleged to have been committed." The trial court thereupon ordered that as to each count the Commonwealth file forthwith "a statement of such particulars as shall give to the defendant reasonable knowledge of the time and place of the alleged crime and means and manner by and in which it is alleged" that the crime was committed and "a statement of such particulars as may be necessary to give the defendant and the court reasonable knowledge of the nature and grounds of the crime charged." In response thereto, the Commonwealth filed a statement that the time of the commission of the murder upon which it relied was between 10 P. M. on September 19 and 12.30 P. M. on September 20 of a certain year, that the place was "in or about that part of the town of Dartmouth called Padanaram," but that it was unable to file as to either of the counts of the indictment any further particulars which would "give the defendant or the court further knowledge of the means and manner whereby the crime was committed." The defendant thereupon filed motions that the particulars be adjudged insufficient and the indictment therefore be dismissed, and that each count be quashed and dismissed because of the insufficient bill of particulars. The motions after a hearing were overruled, and the defendant excepted and appealed. *Held*, that the exceptions must be overruled and the appeals dismissed, because the only reasonable interpretation of the record was that the final view of the trial court was either that the particulars furnished were a sufficient compliance with the court's final order, or that no full compliance was possible and therefore that none was to be required.

Where there is no statement in an indictment for murder of the time when the crime is alleged to have been committed, but the caption of the indictment states that the indictment was presented by the jurors on the "first Monday of November in the year of our Lord one thousand nine hundred and eight," and a bill of particulars filed by the Commonwealth states that the time it relied on was "between ten o'clock in the evening of September 19 and twelve thirty o'clock in the afternoon of September 20" of a certain year, an exception to and an appeal from the denial of a motion to quash the indictment because in connection with the bill of particulars it did not "plainly and concisely, or sufficiently, describe the" time of the crime, respectively must be overruled and dismissed.

Where there is no statement in an indictment for murder of the place where the crime is alleged to have been committed, but the caption of the indictment states that the indictment was presented in the county of Bristol, and a bill of particulars filed by the Commonwealth states that the place relied on was "that part of the town of Dartmouth commonly called Padanaram," this court will take judicial notice of the fact that there is only one town called Dartmouth in Bristol County, and an exception to and an appeal from the denial of a motion to quash the indictment because in connection with the bill of particulars it did not "plainly and concisely, or sufficiently, describe the" place where the crime was committed, respectively must be overruled and dismissed.

Each of three counts of an indictment for murder charged an assault and alleged that by reason of the acts described therein the victim instantly died. One count charged that the defendant "with his hands or some instrument to the jurors unknown did choke and strangle" the victim, a woman; another charged that the defendant "did throw and push her into a certain river, by means of which throwing and pushing she . . . was . . . drowned," and the last count charged that the defendant "with his hands or some instrument to the jurors unknown,

or by some other means to the jurors unknown, did suffocate" the victim. In response to an order that the Commonwealth file a statement of such particulars as would give to the defendant reasonable knowledge of the means and manner by and in which it was alleged that the crime was committed, the Commonwealth filed a statement that it was "unable to file as to either of the counts . . . any further particulars which will give the defendant or the court further knowledge of the means and manner whereby the crime was committed." The defendant moved that all the counts be quashed on the ground that they did not, in connection with the bill of particulars, "plainly and concisely, or sufficiently, describe the" act constituting the crime charged or the manner and means by which it was committed. The motion was denied and the defendant excepted and appealed. *Held*, that the exception must be overruled and the appeal dismissed, because each count, taken in connection with the bill of particulars, contained such particularity of allegation as might be of service to the defendant in enabling him to understand the charge and to prepare his defense.

In an opening statement to the jury at the trial of an indictment for murder, the district attorney stated, as facts which he expected to prove, matters as to which it was at least doubtful whether they might not be material in certain aspects of the other evidence. After such matters were stated, counsel for the defendant asked that the statement "be struck out as an improper statement, not properly evidence in the case." The trial court stated in the presence and hearing of the jury that the jury and counsel understood that "the opening is not evidence. . . . It is not to affect the jury except as supported by evidence later. If the jury so understand it, I will let it stand." And later in the charge to the jury they were instructed accordingly. *Held*, that there was no error in the action of the court.

At the trial of an indictment charging the defendant with the murder of his wife on September 19, 1908, it appeared that no one saw the alleged crime committed. There was evidence tending to show that at the time of the alleged murder the defendant was between twenty-five and thirty years of age; that on October 3, 1907, a second period of enlistment in the United States army had expired, for three years before which he had been stationed at Fort Rodman in New Bedford and had had very close, even illicit, relations with a girl named G., in whose presence the defendant had shot a man and who had been the only eyewitness of that act; that on October 8, 1907, the defendant went to Tennessee where on October 26, 1907, he married; that soon afterward he re-enlisted and returned to New Bedford, his wife later joining him; that, by agreement between himself and his wife, she was introduced as his sister because they feared that they might arouse the hostility of G. which might result in the defendant's arrest for homicide; that the wife therefore boarded away from the barracks and the defendant lived in the barracks; that subsequently the defendant and his wife quarrelled and she told of his having shot the man in the presence of G., which resulted in the defendant's arrest, trial and discharge in the District Court in July, 1908; that at this time G. learned of the defendant's marriage; that shortly after the trial the defendant was arrested and convicted of non-support of his wife. There was conflicting evidence as to whether the relations between the defendant and his wife were affectionate. Further evidence tended to show that on Saturday, September 19, 1908, the defendant's wife went upstairs to her room early and got into bed, that after a few minutes she rose from the bed, left the house by stealth and, after making a call upon a friend, took a car to Padanaram, a part of the town of Dartmouth a few miles distant, arriving there

a little after ten o'clock in the evening. The next day her dead body was discovered floating in water two feet in depth near the bridge at Padanaram, with no mark upon it excepting a slight scratch near one eye; that at the time of her death she was from three and a half to four months advanced in pregnancy. Subject to exceptions by the defendant, the Commonwealth was allowed to introduce testimony of various witnesses as to interviews between the defendant and his wife in July and August, 1908, when he had used vile and abusive epithets toward her; evidence that the defendant had brought to his wife a bottle of laudanum, a bottle of larkspur, and a bottle containing another liquid, saying "I want to get rid of that baby"; testimony of one who stated that the defendant had said to him after the proceedings for non-support that he did not like giving his wife "\$12 out of his pay because he wouldn't have enough money for himself"; testimony of a member of the New Bedford police that he had asked the defendant in the presence of his wife, "if it wouldn't be better for him to give the money to his wife instead of spending it where he was spending it," and that the defendant used vile, abusive and threatening language toward his wife; and letters which passed between S. and the defendant from October 29, 1907, to September 10, 1908, which showed that G. was infatuated with the defendant and was loyal to him even after she learned of his perfidy, which letters the defendant had kept and had not destroyed. *Held*, that the evidence excepted to was none of it too remote and was relevant and material as tending to show the defendant's attitude of mind toward his wife and a motive on his part for desiring to get rid of her.

At the trial of an indictment which charged that the defendant murdered his wife at Padanaram, a part of the town of Dartmouth, there was evidence tending to show that the defendant was seen at Padanaram at a certain time, and that, about five minutes before, the defendant's wife also was seen there, that previous to the time when she was seen at Padanaram the wife had left a house where she was boarding and had called on a friend. Subject to an exception by the defendant, the friend was allowed to testify that the wife on previous occasions had seemed depressed in spirits, but that on the occasion in question she had seemed happier, and that she had stated that she then was on her way to Padanaram to meet her husband to look at a cottage which they could have for the winter. One of the grounds of defense was that the wife committed suicide. *Held*, that the evidence was admissible as tending to show the state of mind of the wife just preceding her death, following *Commonwealth v. Trefethen*, 157 Mass. 180.

At the trial of an indictment which charged that the defendant murdered a woman by choking or strangling or suffocating her "with his hands or some instrument to the jurors unknown," it appeared that the body of the woman was found floating in two feet of water, that there were no marks of violence thereon and that no one saw the alleged crime committed. Medical experts for the Commonwealth, in answer to a hypothetical question, which assumed as true the facts placed in evidence by the Commonwealth, stated it as their opinion that the cause of the death was suffocation or strangulation, not drowning. There also was evidence tending to show that the defendant and the woman were both in the vicinity of the place where the body was found late in the evening preceding the time when it was found; that the defendant had been a private in the United States army for many years, and was illiterate. Subject to an exception by the defendant, the Commonwealth was allowed to introduce in evidence a soldier's handbook which was found among the defendant's effects and contained instructions and diagrams, among others, for the compression of

the carotid artery, the pages where such instructions and diagrams were found being turned down when the book was found. There also was evidence that the defendant had received oral instructions on the same subject and had been warned that if both the carotid arteries were compressed simultaneously, "there is liable to be something happen." *Held*, that the evidence was relevant and material and was admitted rightly.

At the trial of an indictment for murder, the defendant introduced evidence tending to show that, at the time of the alleged murder, he was with one W., a woman, at a place some distance from the place where the crime was alleged to have been committed, and offered to prove by another witness that he interviewed the witness on the afternoon of the day preceding that of the alleged crime and sought to engage a room at the witness's home for W. The evidence was excluded. *Held*, that it was excluded rightly, since it had no tendency to show that the defendant was not at the place of the alleged crime at the time when it was alleged to have been committed.

At the trial of an indictment for murder, a woman, W., testified on behalf of the defendant that at the time of the alleged murder the defendant was with her. Subject to an exception by the defendant, the Commonwealth was allowed to introduce in evidence letters from W. to the defendant which tended to show intimacy and friendly feeling between them. *Held*, that the letters were admissible as tending to show bias of the witness in favor of the defendant.

At the trial of an indictment for murder, it appeared that after the defendant's arrest he was examined by the chief of police of a certain city, who was a witness for the Commonwealth. The defendant sought to show that a certain woman, whose deposition afterwards was taken at the request of the defendant and was in evidence, came to the chief of police before the trial and told him that she was thinking of leaving the Commonwealth, and that he said that she need not stay, and that he did not communicate her intention to the defendant. The trial court excluded the evidence offered, without prejudice to the right to renew the offer if the evidence should "become competent later," and the defendant excepted. The offer was not renewed. The evidence taken by deposition, in connection with the other evidence in the case, was as favorable to the Commonwealth as to the defendant. *Held*, that the act of the chief of police fell far short of any tendency to show bias, and that the action of the trial court in excluding it was proper.

At the trial of an indictment for murder, it appeared that the deceased was the wife of the defendant, and that there was no eyewitness to the alleged crime, but that the wife's body was found floating in two feet of water near Padanaram bridge in the town of Dartmouth shortly after noon on a Sunday. A witness for the Commonwealth, who maintained a pavilion near Padanaram bridge, testified that a woman, dressed as was the wife when her body was found, came up the steps of the pavilion shortly before ten o'clock on Saturday night and turned away, and that about five minutes later a man walked up the platform and looked in over the counter, that he saw the same man the following day, that his accurate recollection of first speaking of the occurrence was the following Monday evening, while talking with one S. and two others; that on the following Wednesday or Thursday he identified the defendant, then in custody, as the man whom he had seen on Saturday and Sunday. S. then was called as a witness and testified, subject to an exception by the defendant, that on Sunday afternoon he had seen the defendant come into the pavilion referred to, and that that evening he had had a conversation with the proprietor of the pavilion, the

previous witness. He then answered affirmatively the question, "Whether or not the defendant that Sunday evening was the subject matter of conversation between you?" *Held*, that the evidence rightly was admitted.

An indictment for murder charged in various counts respectively that the alleged crime was accomplished by pushing the victim, a woman, into a river whereby she was drowned, by choking and strangulation, and by suffocation. There was no eyewitness to the crime. The body of the victim was found in a river in two feet of water, with no marks of violence upon it. There was evidence tending to show that the defendant and the victim were in the vicinity of the place where the body was found on the night before it was found, and that previously the defendant had been studying and receiving oral instruction with regard to the production of unconsciousness by compression of the carotid arteries. Medical experts called by the Commonwealth, in answer to hypothetical questions based on the facts in evidence, testified that the cause of the death was strangulation or suffocation. Medical experts for the defendant testified that the cause was drowning. The defendant's contention was that the deceased committed suicide. There was ample evidence of motive for the murder. The trial court refused to rule that on the evidence the verdict should be "not guilty" as to all the counts. *Held*, that the ruling was right, because the evidence was ample to warrant a verdict of guilty on each of the counts.

At the trial of an indictment for murder where the evidence is circumstantial and there is testimony by medical experts, it is proper to refuse to rule as matter of law that "opinion evidence is to be received with caution and where there is an honest difference of opinion among qualified experts the jury ought not to convict."

At the trial of an indictment for murder it is proper to refuse to rule as matter of law that "Evidence as to oral statements alleged to have been made by the defendant should be received with caution."

At the trial of an indictment for murder the following instructions contained in the charge to the jury on the question of evidence which tended to show a motive for the alleged crime were held to be clear and correct: "Motive is no part of the offense charged, and the Government is not obliged in any case to prove a motive for murder, yet, evidence tending to show a motive is always competent, because if a motive for the crime is clearly shown, it may help to confirm the conclusion reached from all the other evidence, that the accused has committed the offense charged. While motive is not an essential ingredient of the crime of murder and it may be committed without a motive, yet it never can be committed without an intent, and as bearing upon the question of intent, motive or absence of motive may present considerations of the utmost importance. Motive often furnishes corroboration of intent in a case depending upon circumstantial evidence, and as this case depends upon circumstantial evidence, where a motive is shown and clearly established, such evidence of motive is competent for the consideration of the jury in connection with all the evidence in the case as bearing upon the intent with which the crime was committed, and on the other hand, absence of motive even if not conclusive may be considered as bearing upon the question of intent."

At the trial of an indictment charging the defendant with the murder of a woman who was his wife, there was evidence tending to show that the defendant and his wife had quarrelled, that he was annoyed at the approaching birth of a child and had attempted to induce her to procure an abortion, and that he had used vile epithets and abusive language toward her and had threatened her, and that he had been

convicted on a complaint by her charging him with non-support. The following instructions, contained in the charge to the jury as to such evidence, were held to be clear and correct: "There has also been some evidence introduced tending to show that the prisoner had tried to induce his wife to take certain medicines or drugs for the purpose of procuring her miscarriage; and also evidence tending to show that the prisoner had been arrested for failure to support his wife. All the evidence on these various matters is not competent except so far as it bears upon the relations of the prisoner with his wife, in so far as it tends to show a motive for the offense for which he is now being tried. The jury should not consider any of this evidence as having any bearing upon the case except so far as it may or may not indicate a motive on his part to kill his wife. The fact, if it be a fact, that a person has committed a crime is not evidence that he has committed another crime."

At the trial of an indictment charging the defendant with the murder of his wife, there was evidence tending to show that before his marriage he had had intimate, even illicit, relations with one G. whom he had deceived as to his marriage, and that he had continued such intimate relations after the marriage; that, after G. discovered how he had deceived her, and after the defendant had quarrelled with his wife, G. still remained faithful to him. Letters between G. and the defendant were introduced in evidence. The following instructions, contained in the charge to the jury on the subject of such letters, were held to be clear, correct and sufficient: "Certain letters claimed to have been written by the prisoner to G., and other letters claimed to have been written by G. to the prisoner have been admitted in evidence. All these letters were admitted solely, so far as they had any bearing upon the relations existing between the prisoner and G., as bearing upon the question whether the prisoner did or did not have any motive for committing the offense charged. These letters should not be considered by the jury for any other purpose."

INDICTMENT, returned on November 6, 1908, charging the defendant with the murder of Ida Howard.

The first count of the indictment charged that the defendant "did assault and beat Ida Howard with intent to murder her by choking, suffocating or drowning her, and by such assault and beating did kill and murder Ida Howard." The second count charged that the defendant "did assault and beat Ida Howard with intent to murder her; and with his hands or some instrument to the jurors unknown did choke and strangle her; of which choking and strangling the said Ida Howard then and there instantly died. And so the . . . [defendant] . . . the said Ida Howard, did kill and murder." In the third count it was charged that the defendant "did assault and beat Ida Howard with intent to murder her; and did throw and push her into a certain river, by means of which throwing and pushing, she, the said Ida Howard, was then and there drowned, of which drowning she then and there instantly died," and that thus the murder

was accomplished. The charge in the fourth count was that the defendant "did assault and beat Ida Howard with intent to murder her; and with his hands or some instrument to the jurors unknown, or by some other means to the jurors unknown, did suffocate her, of which suffocating the said Ida Howard then and there instantly died," and that thus the murder was accomplished.

On December 10, 1908, the defendant moved that "the Commonwealth be ordered to file a bill of particulars, under each indictment and each count of each indictment against him, setting forth fully and in detail the time and place of the alleged crime with which he is charged and the manner and means by and in which it is alleged to have been committed." The motion was heard by *Bishop, J.*, who made the following order: "If the Government intends to proceed upon the first count, specifications are ordered to be filed within ten days, stating the means and manner with as much particularity as can be without disclosing the evidence. The motion is disallowed as to counts two, three and four. No question is made as to time and place."

The district attorney then filed a bill of particulars containing the same specifications as those stated in the bill which is quoted in the opinion, the only difference in form being that in this first bill of particulars the last paragraph as it appears in the bill quoted in the opinion was repeated as to the second, third and fourth counts of the indictment.

There was a rehearing as to the motion for particulars before *Crosby, J.*, and an order was made which is quoted in the opinion, where also are stated fully the further proceedings preceding the trial.

The case was tried before *Crosby* and *Sanderson, JJ.*

The statement made by the district attorney in his opening, which is referred to in the opinion, was made in reference to the feeling that the defendant had displayed toward Ida Howard, his wife, and was as follows: "About two weeks after this first trial to which I have referred, his wife had him arrested for non-support; she was some five months along in a family way, . . . and it became time, if ever there was a time, when this defendant was called upon by her to contribute to her support. This was after

the other trial in the court [the trial as to the Dewhurst incident, referred to in the opinion], and he hadn't done anything, and wouldn't do anything, and said he wouldn't do anything, and the only recourse left was for Ida Howard to go to law, and she goes down to the police court and there makes complaint, and the defendant is brought into court, found guilty of non-support, fined a small fine, rather than pay it goes to jail, and states, if I recall aright, that he never would pay it. He is in jail several days."

The witness Johnson, referred to in the opinion, testified without objection that he and the defendant were in the hospital in Fort Rodman together in the summer of 1908 and had talks together, and that the defendant, "in referring to the trouble that his wife had caused him by having his pay attached, said 'I'll get rid of her or get rid of myself.'" Subject to an exception by the defendant, he then testified that in August, 1908, the defendant made to him the statement quoted in the opinion.

The witness Butts, referred to in the opinion, testified that he was a member of the New Bedford police, and that he spoke to the defendant about the support of his wife. Subject to an exception by the defendant, he then was allowed to state that he asked the defendant "if it wouldn't be better for him to give the money to his wife instead of spending it where he was spending it"; that the defendant cursed and swore and told his wife he was sorry he had married her and wished she was back where she came from, and threatened her; that the wife said he struck her, and that she would go and give him away, and he said, "Go, God damn you, I will shoot you and the cop both coming up the stairs"; that the defendant told his wife that, if she had him arrested for non-support, she would be sorry for it. The witness further testified that he went with the defendant to his wife's boarding place and witnessed a quarrel between them, in which the defendant said that the child she was going to have was not his, and used abusive language to her.

Alice Forbes, besides the testimony described in the opinion, testified that the defendant had used profane and abusive language to his wife, had refused to pay his wife's board, and had said to her, "I am through with you; I am through for good and mark my word. If you have me arrested for non-support, I will

fix you"; that Mrs. Howard had said, "You will have to contribute something toward my support. I am in a delicate condition"; that the defendant said, "I know when you expect that damned thing, and it don't belong to me anyhow"; that Mrs. Howard began to cry and that the defendant said, "It's all bosh"; that before he went out the defendant said to his wife, "I'll fix you, and some day people will wake up and find you with your head hanging out of the window"; and that the wife said, "Yes, you have said that a number of times."

Freeman A. Forbes testified that he was present and heard a conversation between the defendant and his wife, in which the defendant called his wife vile names.

The witness Edwards, referred to in the opinion, first was asked "Whether or not [the defendant] arranged with you [on the afternoon of Friday preceding the murder] for a woman to stop at your house the following night"? The defendant's counsel, in response to a question by the court, "On what ground are you offering that?" stated: "Later we are going to bring evidence that the woman that Howard was with Saturday night was to put up at Edwards's house, and that on Friday afternoon Howard had gone to his shop for the purpose of making arrangements for this girl to stay at his house that Friday night." The question then was reframed as follows: "Did Howard arrange with you, that Friday afternoon, for Lena Watson to spend the next night, being Saturday night, at your home?" and was excluded subject to an exception by the defendant.

One Hart, a witness for the Commonwealth, testified that on the night of September 19, 1908, he was in a pavilion which he conducted at Padanaram; that after the 10.15 P. M. car left for the city that night, he saw a woman come upon the steps of the pavilion, dressed in dark clothing with a brown veil tied over a medium-sized hat [this description corresponds to that of the costume Mrs. Howard had on when her body was found]; that after hesitating for a moment, she went away; that about five minutes later a man walked up to the platform of the pavilion and looked in over the counter; that the man was dressed in dark civilian clothing and wore a soft hat; that he saw the same man the following day; that the man was then dressed in regulation fatigue uniform and fatigue cap; that on the following Wed-

nesday or Thursday he went to the House of Correction and picked out the defendant, who was dressed in civilian's clothes, as Howard; that Howard was the man he saw on his pavilion on Saturday night. In cross-examination, he testified that his accurate recollection of first speaking of the occurrence of the previous Saturday night was Monday evening, September 21, while talking with David Simmons, and two others.

David Simmons, called for the Commonwealth, testified that on the night of September 19, 1908, he was in Hart's pavilion at Padanaram until between 10.10 and 10.20 P. M.; that the next afternoon he saw the defendant come into the pavilion; and that that evening he had a conversation with Hart. Subject to an exception by the defendant, he then was asked, "Whether or not the defendant Howard that Sunday evening was the subject matter of conversation between you?" and answered affirmatively.

Besides the evidence already stated, and that stated in the opinion, there was evidence, regarding the movements and whereabouts of the defendant on the night of the homicide, tending to show that he was seen at Fort Rodman by several witnesses between 6 and 7 P. M.; that he stated to one Sergeant Riley that he would leave the Fort and return or "mark in" at 2 A. M. and that he was going fishing for eels; that he was seen soon after 6.30 P. M. with two oars hiding behind the sea wall on the easterly side of the Fort and said to the sentinel that he had taken Lacey's oars, and asked the sentinel not to tell any one he had seen him; that the sentinel a short time later saw some man row away; that at about eight o'clock the defendant was seen on the reservation going toward the west side of the reservation; that one Doyle, at the defendant's request, took the boat from the defendant and rowed it around to the garden at the westerly side of the reservation where he again met the defendant who took the boat and rowed off at some time between 7 and 9 o'clock P. M.; that it would take about an hour and twenty or twenty-five minutes to row from the westerly side of Fort Rodman reservation to Padanaram bridge; that the defendant was seen at Hart's pavilion, which was near the bridge, at about 10.30 P. M.; that a man and a woman were seen on Padanaram bridge at different times between 10.45 and 11.30 o'clock that evening; that between 11.45 P. M. and midnight a woman's muffled scream was heard, coming

from the direction of the bridge; that the defendant was seen on the reservation at about 2.30 A. M. coming from the direction of the wharf; and that he "marked in" some time between 2.30 and 2.55 A. M.

There also was evidence tending to show that the defendant had studied the handbook, referred to in the opinion, with regard to the effect of compression of the carotid artery, and the diagrams in that book illustrating means of compression; that he had taken instruction from one Doyle as to the method of compression, and that Doyle had told him not to compress both arteries at the same time "because there is liable to be something happen."

Experts for the government in answer to a hypothetical question based on testimony as to the condition of the body when found and afterward, and other facts in the case, testified that in their opinion the cause of death was suffocation or strangulation, not drowning. They also testified that pressure upon both carotid arteries would produce unconsciousness in about twenty seconds. Experts for the defense testified that in their opinion the cause of death was drowning.

There also was testimony that when arrested the defendant told the police that he was on the reservation all the night of September 19; that he was with one Friley at the hospital from 9 to 11 P. M. and went to bed at 12 o'clock; that the defendant admitted writing a letter at 8 o'clock on the morning of the twentieth before he was arrested to Friley something like this, "Friend Friley, I will ask you to help me to establish an alibi. I want you to say that you were with me from 9.30 to 11 Saturday night. Destroy the letter and don't let any one see it." There was evidence from Friley and other soldiers that the alibi then attempted to be set up by the defendant was false.

The defendant produced a witness, Lena Watson, who said that she and her mother arrived in New Bedford at 6.30 P. M., September 19, took a car at the waiting room at 7.30, arrived at Fort Rodman about 8 o'clock, met the defendant on the westerly side of the reservation and stayed there with him until after 11 P. M. Certain street railway men testified that the car leaving the waiting room at 7.30 P. M. for Fort Rodman did not arrive there that night; that on account of a broken wire there were

no cars running either north or south on the Fort Rodman line between 7.10 or 7.15 and 8.20 P. M. that night.

At the close of the evidence, the defendant asked the trial court to rule that a verdict of not guilty should be returned on each of the remaining three counts, and as follows:

"4. There is no evidence that Ida Howard was murdered sufficient to justify submitting that question of her murder to the jury.

"5. Opinion evidence is to be received with caution, and where there is an honest difference of opinion among qualified experts the jury ought not to convict."

"9. Evidence as to oral statements alleged to have been made by the defendant should be received with caution.

"10. The defendant requests full instructions as to his rights in not taking the witness stand, on the question of motive, and, in connection therewith, the Sturtevant letters, and on the question of reasonable doubt."

"13. If the jury are left in doubt as to the manner in which the deceased lost her life, they ought not to convict."

That portion of the charge of the jury which referred to motive, to which the defendant excepted, was as follows:

"Motive is no part of the offense charged, and the government is not obliged in any case to prove a motive for murder, yet, evidence tending to show a motive is always competent, because if a motive for the crime is clearly shown, it may help to confirm the conclusion reached from all the other evidence, that the accused has committed the offense charged.

"While motive is not an essential ingredient of the crime of murder and it may be committed without a motive, yet it never can be committed without an intent, and as bearing upon the question of intent, motive or absence of motive may present considerations of the utmost importance.

"Motive often furnishes corroboration of intent in a case upon circumstantial evidence, and as this case depends upon circumstantial evidence, where a motive is shown and clearly established, such evidence of motive is competent for the consideration of the jury in connection with all the evidence in the case as bearing upon the intent with which the crime was committed, and on the other hand, absence of motive even if not

conclusive may be considered as bearing upon the question of intent."

The portion of the charge which referred to the relations between the defendant and his wife and to the Sturtevant letters, to which the defendant excepted, was as follows:

"There has also been some evidence introduced tending to show that the prisoner had tried to induce his wife to take certain medicines or drugs for the purpose of procuring her miscarriage; and also evidence tending to show that the prisoner had been arrested for failure to support his wife. All the evidence on these various matters is not competent except so far as it bears upon the relations of the prisoner with his wife, in so far as it tends to show a motive for the offense for which he is now being tried. The jury should not consider any of this evidence as having any bearing upon the case except so far as it may, or may not, indicate a motive on his part to kill his wife. The fact, if it be a fact, that a person has committed a crime is not evidence that he has committed another crime.

"Certain letters claimed to have been written by the prisoner to Grace Sturtevant, and other letters claimed to have been written by Grace Sturtevant to the prisoner, have been admitted in evidence. All these letters were admitted solely, so far as they had any bearing upon the relations existing between the prisoner and Miss Sturtevant, as bearing upon the question whether the prisoner did or did not have any motive for committing the offense charged. These letters should not be considered by the jury for any other purpose."

The jury found the defendant guilty of murder in the second degree; and the defendant alleged exceptions.

J. M. Morton, Jr., (E. T. Bannon with him,) for the defendant.

J. M. Swift, District Attorney, (F. B. Greenhalge, Assistant Attorney General, with him,) for the Commonwealth.

HAMMOND, J. 1. As to the various motions to dismiss, to quash and to dismiss, and to quash. After the plea of not guilty the defendant moved as to each count of the indictment for a bill of particulars setting forth fully and in detail the time when, the place where, and the manner and means in and by which the alleged murder was committed. Such proceedings were taken upon this motion as finally resulted in an order by

the court that the Commonwealth file forthwith "a statement of such particulars as shall give to the defendant reasonable knowledge of the time and place of the alleged crime, and the means and manner by and in which it is alleged to have been committed; and shall also file a statement of such particulars as may be necessary to give the defendant and the court reasonable knowledge of the nature and grounds of the crime charged, and that all such particulars shall be so filed as to the second, third and fourth counts of the indictment."

Thereupon the district attorney filed the following paper entitled an "additional bill of particulars":

"And now comes the district attorney and in compliance with the order of the court upon defendant's motion for bill of particulars sets forth the following particulars:

"The time which the Government relies on when the murder was committed is between ten o'clock in the evening of September 19, 1908, and twelve thirty o'clock in the afternoon of September 20, 1908.

"The place where it is claimed the murder was committed is in or about that part of the town of Dartmouth commonly called Padanaram.

"As to the means and manner whereby the murder was alleged to have been committed, the Commonwealth is unable to file as to either of the counts of the indictment any further particulars which will give the defendant or the court further knowledge of the means and manner whereby the crime was committed."

The defendant moved that the particulars be adjudged insufficient and the indictment dismissed on that account; and further as to each count filed a motion that the count be quashed and dismissed because of the failure of the Commonwealth to file a proper and sufficient bill of particulars thereunder in accordance with the order of the court. The motion was denied and the defendant "excepted to and appealed from such denial."

The defendant further filed as to each count a motion to quash, which so far as respects the last three counts upon which alone the case was tried, set forth the following grounds: "For that it [the count] does not in connection with the bill of particulars heretofore filed thereunder by the Commonwealth

plainly and concisely, or sufficiently, describe the act constituting the crime with which the defendant is thereby charged, or the time, place, manner and means by which said crime was committed; and because said third count in connection with the bill of particulars filed thereunder does not plainly and fully, substantially and formally describe the crime with which the defendant is charged."

Upon the hearing on this motion the district attorney noproceded the first count and the motion was thereupon overruled, and the defendant excepted to and appealed from the order overruling the motion.

It is argued by the defendant that the district attorney's statement that the Commonwealth could not furnish the information was a subterfuge and evidently was so regarded by the court, for the final order was made after such a statement had been once filed by the district attorney; and that this final order amounts to an adjudication to that effect. Whether the statement of the district attorney was a subterfuge or not was a matter for the trial court, and that court may well have come to the conclusion that in view of the difficulties of the situation the statement of the district attorney as to knowledge of the precise way in which the murder was committed was true, and that it would be unjust to hamper the prosecution by compelling it to guess, and to hazard its case on the accuracy of the guess. And the fact, if it be a fact, that the court at one time in the proceedings thought that the statement of the district attorney that he could specify no further than he had done was no excuse for not specifying further, furnished no reason why the court, upon additional evidence, argument or reflection, could not modify its view and change its course accordingly. The final view of the court seems to have been either that the specifications were a sufficient compliance with its final order, or that no full compliance was possible and therefore not to be required. There is no other reasonable interpretation of the record. The motions to dismiss and "to quash and dismiss," even if otherwise unobjectionable, were therefore rightly overruled. The prosecution had complied with the order so far as the court finally required.

The motion to quash, which is applied to each of the last three

counts, raises the question whether they each in connection with the particulars actually furnished are sufficient in law. These counts were drawn up apparently under R. L. c. 218, §§ 17 *et seq.* (formerly St. 1899, c. 409). The time is not stated in either count, but it is provided in § 20 of that chapter that the "time and place of the commission of the crime need not be alleged unless it is an essential element of the crime." Neither time nor place are an "essential element" of the crime of murder within the meaning of this term as used in this part of the section, and hence they need not be inserted in the body of the count. The provision immediately following the language above quoted is therefore applicable, namely, "The allegation of time in the caption shall, unless otherwise stated, be considered as an allegation that the act was committed before the finding of the indictment, after it became a crime, and within the period of limitations." It may be noted in passing that in the case of murder there is no limitation as to the time within which an indictment may be found. R. L. c. 218, § 52. The time given in the caption is the "first Monday of November in the year of our Lord one thousand nine hundred and eight." The bill of particulars specifies the time of the committal of the murder as "between ten o'clock in the evening of September 19, 1908, and twelve thirty o'clock in the afternoon of September 20, 1908." There is nothing to show that this specification was not as definite as the prosecution could have safely made, or the defendant could have reasonably needed for the proper preparation of his defense; and it was much more definite than the defendant would have been entitled to as matter of right under the common law.

This same section (§ 20) contains also the following: "The name of the county and court in the caption shall, unless otherwise stated, be considered as an allegation that the act was committed within the territorial jurisdiction of the court." The territorial jurisdiction of the court was the county of Bristol. The bill of particulars describes the place as "that part of the town of Dartmouth commonly called Padanaram." The court will take judicial notice that in Bristol County there is only one town called Dartmouth, and the evidence shows that a part of that town is called Padanaram. It is manifest that each count

of the indictment taken in connection with the bill of particulars sufficiently designates the place.

As to the manner and means, each count charges an assault; the second count charges that the defendant "with his hands or some instrument to the jurors unknown, did choke and strangle" the victim; the third count that he "did throw and push her into a certain river, by means of which throwing and pushing she . . . was then and there drowned," and the fourth count that he "with his hands or some instrument to the jurors unknown, or by some other means to the jurors unknown, did suffocate" her. Each count charges an assault and alleges that by reason of the acts thus therein set forth the victim instantly died.

The rules of law require the grand jury to state their charge with as much certainty as the circumstances of the case will permit, but if the circumstances will not permit a fuller and more precise statement a count that charges an assault upon the deceased in some way and manner and by some means, instruments and weapons to the jury unknown is not invalid for indefiniteness. *Commonwealth v. Webster*, 5 Cush. 295. There can be no doubt that each count of the indictment in the case before us, when taken in connection with the bill of particulars and interpreted in the light of the statute, R. L. c. 218, §§ 15-40, both inclusive, contains all the essentials of a common law count. *Commonwealth v. Desmarteau*, 16 Gray, 1. *Commonwealth v. Holmes*, 157 Mass. 233. *Commonwealth v. Coy*, 157 Mass. 200. *Commonwealth v. Snell*, 189 Mass. 12.

As to the defendant's general contention that the crime is not fully and plainly, substantially and formally described to him as required by the twelfth article of the Declaration of Rights in the Constitution of the Commonwealth, it is sufficient to quote from *Commonwealth v. Robertson*, 162 Mass. 90, 96, the statement that these provisions for the protection of the accused person "only require such particularity of allegation as may be of service to him in enabling him to understand the charge and to prepare his defense." Each count taken in connection with the bill of particulars and read in the light of the statute complies with this rule. The motion to quash was therefore rightly overruled.

2. The jury were instructed that the statements made in the

opening of the case by the district attorney to which the defendant objected were not to be regarded by the jury unless subsequently proved. While counsel in opening a case should not be allowed to state facts which are plainly irrelevant to the issues on trial and which therefore are inadmissible, still it is to be remembered that it is not the practice to pass upon the admissibility of evidence during the opening but to leave questions of that kind to be passed upon subsequently, when in the due course of the trial the evidence is offered. It frequently happens that counsel acting in good faith state facts deemed by them to be material which subsequently are ruled by the court to be immaterial. In a case of doubt the counsel usually is allowed to proceed and the jury are instructed to pay no attention to the statement unless subsequently proved. It was, to say the least, doubtful whether these facts after all might not in certain aspects of the other evidence be material. Moreover the defendant did not make any objection until the words were spoken, and his motion then was that the statement "be struck out . . . as an improper statement, not properly evidence nor in the case." The court in substance granted the motion when it said in the presence and hearing of the jury that the jury and counsel understand that "the opening is not evidence." "It is not to affect the jury except as supported by evidence later. If the jury so understand it, I will let it stand." And in the charge to the jury they were so instructed. In any aspect of the matter there does not appear to be any error in this action of the court.

3. During the trial various exceptions were taken by the defendant to the rulings as to admission and exclusion of evidence. They will be considered substantially in the order in which they are argued on the defendant's brief.

Before considering the exceptions in detail it may be well to take a general view of the situation at the trial. Many of the facts are not now in dispute. At the time of the alleged murder the defendant was between twenty-five and thirty years of age. He enlisted in the army of the United States for the second time in 1904, and was sent to Fort Rodman in New Bedford. This enlistment expired on October 3, 1907, and he went to Tennessee, where he was acquainted. He married there, on October 26, 1907, Ida Williams. Soon after his marriage he enlisted for

the third time as a private and returned to New Bedford, where he remained. Soon after his return his wife joined him, and for several months, by agreement between them, passed as his sister. It was contended by the defendant that the reason of this deception was in substance that some time before the expiration of his second enlistment, and while in the company of a girl whose name was Grace Sturtevant, the defendant had shot a man named Dewhurst; that no one knew of his part in the affair except her; that although the shooting was justifiable yet the defendant did not want his connection with the matter known, and that it was not known or suspected; that it was feared by the defendant and his wife, to whom he had confided the story of the shooting, that Miss Sturtevant, if informed of the marriage, might become angry and notify the police about the Dewhurst affair and turn against him in her testimony. For several months Miss Sturtevant was not aware of the marriage, the defendant's wife being known to her only as his sister.

The evidence tends to show that at last, as a result of a quarrel between the defendant and his wife, the latter revealed the story of his connection with the Dewhurst affair, and he was arrested; and on or about July 21, 1908, after a trial in the District Court, he was discharged. About the time of this trial Miss Sturtevant first became aware of the marriage. The evidence tends further to show that the relations between the defendant and her were very close, even illicit, that this intercourse began before the expiration of the second enlistment and continued with more or less interruption up to the time of the death of his wife.

The evidence as to whether the relations between the defendant and his wife were of an affectionate nature was conflicting. He lived in the barracks while she lived away from there, sometimes working and sometimes boarding, he paying her board.

There was evidence that on Saturday, September 19, 1908, early in the evening, she went upstairs to her room in her boarding house and got into bed; that after a few minutes she rose from the bed, left the house by stealth and after making a call upon Miss Isherwood took a street car for Padanaram, a part of Dartmouth a few miles distant, arriving there a little after ten o'clock that same evening. The next day about noon her dead body was discovered floating in water two feet in depth,

near the bridge at Padanaram. With the exception of a slight scratch near one eye there appeared no mark upon the body. At the time of her death she was from three and a half to four months advanced in pregnancy.

It was the theory of the Commonwealth that after she arrived at Padanaram she met the defendant by appointment, and that he murdered her in some one of the ways respectively set forth in the three counts of the indictment. The defendant denied that he had anything whatever to do with the death, and introduced evidence tending to prove an alibi. He also maintained that death was by suicide; and there was evidence in favor of this view. No one testified as an eyewitness to the assault. The evidence was entirely circumstantial upon that point.

Upon the evidence the Commonwealth contended that the defendant's motive for the crime was his desire to be rid of his wife; that he had a feeling of hostility towards her, based among other things upon the fact that she had caused his arrest and imprisonment for failure to support her, and upon his desire to be free to marry Grace Sturtevant. There was also evidence from which the jury might properly have found that he regarded her as an annoying and expensive burden, and that he felt, especially in view of her pregnancy, that the burden would grow more and more intolerable.

It is manifest that a trial involving the question of the existence of such a motive or cause for the murder might lead to a pretty extensive inquiry into the relations existing between the defendant and his wife. In conducting such an inquiry much must be left to the discretion of the trial court. It is not necessary that any piece of evidence offered should of itself be sufficient to prove the hostile feeling in order that it may be admitted. It is enough if it has some tendency to prove such feeling. Care however should be exercised not to resort to proof of circumstances too remote in time or cause. As said by Colt, J., in *Commonwealth v. Abbott*, 130 Mass. 472, 474, "It is difficult, in dealing with this description of evidence, to define, as matter of law, the precise limits which must practically control its admission"; and as before stated, much must be left to the discretion of the trial court. In the case before us there is no

trouble on the score of remoteness of time, and the only question as to much of the evidence admitted against the defendant's exception as to the relations between him and his wife is whether it has any bearing whatever on the alleged feeling of hostility or of the other elements of motive.

As bearing upon that question we think that the testimony of the witness Johnson that the defendant said to him that he did not like the idea of giving his wife "\$12 out of his pay because he wouldn't have enough money for himself," as well as the testimony of the witness Freeman A. Forbes concerning the language used by the defendant to his wife, was pertinent and properly admitted. The same may be said of the harsh and profane language between the defendant and his wife as testified to by Alice Forbes; and also of the conversation between Butts and the defendant. It is argued by the defendant that the question with which Butts opened the conversation with the defendant, namely, whether "it wouldn't be better for him [the defendant] to give the money to his wife instead of spending it where he was spending it," is something not said by the defendant but by Butts; that it impliedly charged the defendant with another crime, namely, non-support of his wife, and had not the slightest bearing on the issues then on trial. But the simple answer is that it was not admitted for that purpose. It constituted the beginning of a conversation which was admissible, and it was useful in ascertaining the full meaning of what the defendant said in reply.

The evidence of the witness Alice Forbes that the defendant brought to his wife a bottle of laudanum, a bottle of larkspur and a bottle containing another liquid, saying "I want to get rid of that baby," although quite remote was also admissible. Whether his desire to get rid of the baby was due to a belief on his part that he was not the father of it, — an idea which the evidence shows he, whether sincerely or not, once at least expressed to his wife, — or whether he thought that being in that condition she was and would continue to be more burdensome to him, it might have been regarded by the jury as an indication of the relations between the parties and of his desire to get rid of her in her then condition. Especially is this so when it is remembered that either because of her refusal to attempt abor

tion, or of her failure to effect it if she had made the attempt, abortion was not effected. Her condition to which he had seemed to object continued to the time of her death.

In support of his exception to the admission of this evidence the defendant says among other things that it practically put the defendant on trial for a separate and independent crime. We cannot agree with the counsel in this statement, but even if it were evidence of another crime it nevertheless would be admissible if material on the issues on trial. See *Commonwealth v. Choate*, 105 Mass. 451, and *State v. Lapage*, 57 N. H. 245, for a discussion of the law on this point. As to the bottles introduced, it is enough to say that they were only incidental to the conversation, and while unimportant still there was no error in admitting them.

The defendant excepted to the admission of certain letters which passed between Grace Sturtevant and him, of which twelve were written by her and five by him. In admitting these the trial court said to the defendant's counsel, "If there is any special matter in the letters to which you object in addition to your general objections, the court would like to have you call it to the court's attention as the letters are read. Only such matters as bear on the motive are supposed to be admitted by the court. If there is anything which in your judgment does not bear on that, if you will call it to our attention we will pass on it." No special objection having been made, only the general exception is to be considered.

Were they admissible as material on the question of motive? Previously to the introduction of the letters Grace Sturtevant, called by the Commonwealth, had testified *inter alia* that she first became acquainted with the defendant in June, 1905; that they became friendly; that she was with him one night at Hazelwood Park; that the occurrences of that night (apparently alluding to the Dewhurst homicide) were kept a secret between them; that in consequence of the defendant's arrest for what happened that night she testified at his trial in the lower court; that before his enlistment expired in 1907 a marriage between them had been talked of; that when he returned he introduced to her Ida Howard, the deceased, as his sister; that after she knew of the defendant's marriage she continued friendly with him; that

the defendant had spoken to her about getting a divorce from his wife; that he told her on Friday, September 18, 1908, that his wife was getting ready to go back to Tennessee; that she and the defendant had corresponded at various times; and that "they had returned their letters."

On cross-examination she testified that she knew "he had other girls . . . and made no objection," and that the evening after the Dewhurst trial he called at her house and asked her forgiveness for the way he had treated her. She also testified that before the Dewhurst trial the defendant made an effort to close the relations which existed between them.

The letters written by her were certainly remarkable. They show that she was infatuated with him, and that notwithstanding the way in which he had treated her and deceived her, and notwithstanding his marriage, she still clung to him even to the last. The letters by him express great desire on his part to see her.

The correspondence shown upon the record before us begins with her letter of October 29, 1907, three days after the defendant's marriage, and ends with hers of September 10, 1908, covering a period of ten and a half months, during which time many events had occurred likely to test her affection for and loyalty to him; and still she stood the test.

These letters from her he did not destroy. He kept them, and the jury may well have found that he cherished them; that bad and immoral as he was he saw something attractive in this steadfast friendship whether pure or impure, and that the idea of the possibility of a legitimate enjoyment of it by means of a marriage had been gradually taking possession of him. Or they may have found that even if the relation was to continue immoral he nevertheless cherished it as desirable. In either event the jury might well find that this relation might have a bearing upon the question whether he desired to be rid of his wife. It is objected by the defendant that some of the earlier letters are too remote, but that is untenable. They all tend to show the same state of mind; and the length of time is material on its nature and steadfastness. Of course the letters of the defendant were admissible; and we think that the whole correspondence was admissible on the question of motive.

On her way from her boarding house to Padanaram the deceased called upon Mrs. Isherwood. This person, called by the Commonwealth, testified that the deceased had called upon her previously and on such occasions had seemed depressed in spirits; but that on this visit she seemed in a happier frame of mind. The witness was then asked whether in the course of the conversation the deceased stated to her that "she was then on her way to Padanaram to meet her husband to look at a cottage which they could have for the winter." The witness replied in the affirmative. The defendant did not object to the form of the question but did object to the substance. The question and answer were admitted and the defendant excepted.

One of the grounds of defense was that the death was suicidal, and in support of this theory evidence was introduced of the despondency of the deceased and of some of her other characteristics as well as of other circumstances. It was material for the Commonwealth to show that her journey to Padanaram that night was not for the purpose of committing suicide. Even if it be assumed that her declaration made but a few hours before her death and while in the very act of going to that place is not admissible as *res gestae* (as to which we give no opinion), yet it is plainly within the rule laid down in *Commonwealth v. Trefethen*, 157 Mass. 180; and it is necessary only to refer to that case for the reasons therefor.

The soldier's handbook containing instructions and diagrams, among which were instructions for the compression of the carotid artery, was properly admitted. It was the book of the defendant and the leaf at that place was turned down, and it may fairly be inferred that he had studied that part of the book with some care. He had also received oral instructions on the same subject. From the absence of any marks of violence upon the throat at the time the body was found, it might have been argued in behalf of the defendant that it would be impossible for him, apparently an illiterate man and having no other than common knowledge of the throat, to have done the deed by violence without leaving any mark. To meet this argument it was competent to show that he had been studying the matter. And this would be so even if, as contended by the defendant, there was no evidence that death was caused by compression of the

carotid artery. The manner in which the evidence tended to show that death occurred is nearly enough allied to the compression of the artery.

The question to Edwards was properly excluded. The fact that the defendant engaged a room for the Watson girl for Saturday night has no tendency to show that he was not at Padanaram at the time of the alleged murder. He cannot make evidence that way. *Commonwealth v. Kent*, 6 Met. 221.

The letters written by Lena Watson were admissible as tending to show intimacy and friendly feeling between her and the defendant and a consequent bias on her part in his favor. If the defendant had desired that that part of the first letter which related simply to the immorality of the witness should be stricken out, and that motion had been overruled, a different question would have been presented; see *Commonwealth v. Churchill*, 11 Met. 538; but his objection being to the whole letter, it was rightly overruled.

The defendant offered to show by Henry W. Mason, the chief of police of the city of New Bedford, a witness called by the Commonwealth,* that Mrs. Bradford, whose deposition, taken on motion of the defendant, was put in by him at the trial, came to the witness and told him that she was thinking of leaving the Commonwealth, and he said she need not stay and did not communicate her intention or what he said to her to the defendant. The court excluded the evidence offered and the defendant excepted. In support of his exception the defendant urges that the evidence was admissible as tending to show an effort by the Commonwealth to suppress evidence relating to the matter in issue; that if admitted it would have furnished a ground upon which the defendant might have legitimately argued that the witness had not endeavored to present fairly the circumstances surrounding the death but had desired to prevent material evidence from being presented to the jury, and thus to affect his credibility. See *Commonwealth v. Min Sing*, 202 Mass. 121. It does not appear that the witness had any control over the movements of Mrs. Bradford, or that he was under any duty legal or moral to communicate what she had said to him, nor in-

* The defendant was arrested by the New Bedford police and was examined by one Mason, the chief of police, and others.

deed whether the witness knew whether on the whole her testimony, if procured, would be favorable or unfavorable to the defendant. And indeed upon inspection of her testimony as it appears upon the record, it may well be argued that when taken in connection with other testimony in the case it is as favorable to the prosecution as to the defense. This act of the chief of police of itself falls far short of any tendency to show bias. Moreover the offer was rejected for the time being, in the then state of the evidence, without prejudice to the right to renew the offer if the evidence offered should "become competent later." It does not appear to have been renewed. There is nothing for the defendant in this exception.

The exception to the testimony of the witness Simmons that the defendant was the subject of a conversation between him and the witness Hart on the evening next following the finding of the body was rightly admitted. The government went quite close to the line but did not cross it.

Several other exceptions were taken with reference to the admission of evidence which have not been argued on the defendant's brief. Although they might be considered waived, yet in view of the grave nature of the crime charged they have been considered. None of them has any merit, and accordingly they are overruled.

4. At the close of the evidence the defendant presented a number of requests for rulings, some of which were given and some refused. So far as refused the defendant excepted.

The defendant stoutly insists that there was no evidence warranting a conviction upon either the second count which charged that murder was committed by choking and strangling, or the fourth which set out the manner as by suffocation. We have carefully read the evidence, including as well the testimony of the medical experts as the other material portions thereof. It would serve no useful purpose to recite it in detail. A careful analysis shows that it was ample to warrant a verdict of guilty upon either of the three counts. Hence the first, and *a fortiori* the fourth, requests were properly refused. The fifth, for reasons too obvious to mention, could not have been given as matter of law; and the same may be said of the ninth. The tenth was sufficiently covered by the charge, as was the thirteenth so far

as the defendant was entitled to it. The exceptions to the refusal to give these requests must be overruled.

5. At the close of the charge the defendant took some exceptions to it. In his brief, however, he has touched upon only two or three of these. He complains that the instructions as to motive, as to the Sturtevant letters, and as to the evidential force of much of the testimony admitted to show the relations of the defendant to his wife and to the witness Sturtevant were insufficient and inaccurate. None of these exceptions to the charge is tenable. A reading of the charge shows that it was judicial in tone and fair in its allusions to the testimony, clear and correct in its exposition of the legal principles involved and their application to the varying possible views of the evidence. In a word, it was apt, full and clear. No one of the exceptions to it is tenable.

Exceptions overruled.

DOMINIC RENADO vs. HENRY T. LUMMUS & another.

Essex. January 19, 1910. — February 23, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Practice, Criminal, Appeal, Suspension of sentence. Police, District and Municipal Courts. Jurisdiction.

The right of appeal in a criminal case in a police, district or municipal court is only from the sentence after conviction.

One, who on a January 6 was convicted in a police court of assault and battery and was sentenced to pay a fine of \$10 and to stand committed until it was paid, when informed of his right to take an appeal, stated in open court that he did not wish to appeal and waived his right to appeal, and requested a suspension of the execution of the sentence. Thereupon under St. 1905, c. 338, amending R. L. c. 220, § 1, the judge ordered that the execution of the sentence be suspended and that the defendant be placed on probation until the sitting of the court on January 12 upon the condition that the fine should be paid during the period of probation. On January 12 it appeared that the fine still was unpaid. The defendant then for the first time claimed an appeal from the sentence but the judge refused to allow it. *Held*, that the defendant's appeal came too late.

Where, after a conviction in a criminal case in a police, district or municipal court and a sentence to pay a fine of \$10 and to stand committed until the fine is paid, the judge finds that the defendant is unable to pay the fine when it is imposed, and probably will not default, and that it will not be detrimental to the interests of the public to suspend the execution of the sentence and place the defendant

on probation, and therefore in accordance with St. 1905, c. 338, amending R. L. c. 220, § 1, suspends the sentence for six days on condition that the fine shall be paid meanwhile, and at the end of such six days, on representations of the probation officer, the judge finds that the fine has not been paid and that the defendant is able to pay it, and thereupon revokes the suspension of the execution of the sentence, the defendant has no right of appeal from such finding and revocation.

Where jurisdiction is given to a court or magistrate by a statute, and there is no provision for an appeal, the decision of the court or magistrate is final.

KNOWLTON, C. J. This is a petition for a writ of mandamus, to be directed to the judge and clerk of the police court of Lynn, to compel them to allow the petitioner's claim of appeal in a criminal case. On January 6, 1910, the petitioner was found guilty of the crime of assault and battery, and ordered to pay a fine of \$10, and to stand committed until it was paid. He was informed of his right to take an appeal, whereupon he said in open court that he did not wish to appeal, and waived his right of appeal. He requested a suspension of the execution of the sentence, and thereupon the judge ordered that the execution of the sentence be suspended, and that the petitioner be placed on probation until the sitting of the court on January 12, 1910, upon condition that the fine should be paid during this period of probation. This order was made under the provisions of the R. L. c. 220, § 1, as amended by the St. 1905, c. 338.

At the sitting of the court on January 12, 1910, the probation officer reported that the fine was still unpaid, and that the petitioner was able to pay it. The petitioner then, for the first time, claimed an appeal from the sentence, but the judge refused to allow it. He then contended that the fine had been paid; but after a hearing the judge found to the contrary, and revoked the suspension of the execution of the sentence. From this finding and revocation the petitioner claimed an appeal to the Superior Court, and he renewed his claim of appeal from the sentence. But the judge refused to allow the appeal, and the clerk refused to enter or record it, or to transmit copies of the papers to the Superior Court.

A right of appeal in a criminal case in a police, district or municipal court is given only to one who has been convicted, and the appeal is only from the sentence, which corresponds to the judgment of the court in civil actions. R. L. c. 219, § 22.

Although this section does not say in terms that the appeal is to be from the sentence, this is its meaning. It is founded on earlier statutes. Rev. Sts. c. 138, § 1; Gen. Sts. c. 173, § 1; c. 120, § 46; Pub. Sts. c. 155, § 58; St. 1893, c. 396, § 48; and in all of these the express language is that the appeal is to be "from the sentence." In the last revision there was no intention on the part of the commissioners or the Legislature to change the meaning of the statutes in this particular. See also St. 1909, c. 381.

The petitioner having waived his right of appeal, and having requested and accepted a different provision for his benefit, his claim of an appeal six days afterwards, at a subsequent sitting of the court, came too late. *Weiner v. Wentworth*, 181 Mass. 15.

The remaining question is whether he had a right of appeal from the finding of the court that he had not performed the condition on which the execution of the sentence was suspended, and from the order revoking the suspension of the execution of the sentence.

The St. 1905, c. 338, amending R. L. c. 220, § 1, which was derived from St. 1900, c. 449, gives a person, convicted of a crime in a police, district or municipal court, an opportunity, if the judge so directs, to have the execution of his sentence suspended, and to be put on probation for such time and on such terms and conditions as the judge determines. One whose sentence is to pay a fine not exceeding \$10 and to stand committed until it is paid, has a right, if the judge finds that he is unable to pay the fine at that time, and will not probably default, and that it will not be detrimental to the interests of the public, to have execution of the sentence suspended, and to be placed on probation. One of the conditions of the probation must be that the fine be paid during the period of probation.

We need not determine how far, if at all, the court has power to change conditions in the further disposition of the case, either by a modification of the sentence, or by dismissing the prosecution, or by putting the case on file, if there is a suspension of the execution of the sentence under the first part of this section. See *Marks v. Wentworth*, 199 Mass. 44; *Commonwealth v. Lobel*, 187 Mass. 288. The action in the present case was under the second provision, as the sentence was to pay a fine not exceeding

\$10, which the petitioner was not able to pay at that time. We are of opinion that the action of the court, which was incidental to statutory proceedings for the benefit of the convicted person after the imposition of his sentence, was not subject to a right of appeal. It is not included in the right of appeal given by the statute. It is not necessary for the protection of the defendant in his right to a trial by a jury. This latter right is fully protected by the power to appeal from the sentence.

Where jurisdiction is given to a court or magistrate by a statute, and there is no provision for an appeal, the decision of the court or magistrate is final. *Fletcher v. Bartlett*, 10 Gray, 491. *Russell v. Goodrich*, 8 Allen, 150. *Mowry's case*, 112 Mass. 394. *Macaig's case*, 137 Mass. 467. *Young v. Blaisdell*, 138 Mass. 344. *Brown's case*, 173 Mass. 498.

These provisions are all intended for the benefit of convicted persons, and in mitigation of the punishment imposed by a sentence which, in the absence of an appeal, is a conclusive adjudication of their guilt. It is proper to entrust these matters of administration to the court, without a right of appeal. As no such right is given by the statute, the petitioner's claim was properly denied. *Brown's case*, 173 Mass. 498. *Commonwealth v. McGovern*, 183 Mass. 238.

Petition dismissed.

The case was submitted on briefs.

J. W. Sullivan, for the petitioner.

W. S. Peters, District Attorney, for the respondents.

CORNELIUS C. KIELY vs. PETER B. CORBETT.

Suffolk. November 10, 1909. — February 24, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY,
SHELDON, & RUGG, JJ.

Evidence, Of fraud. Fraud. Practice, Civil, Order for judgment by full court. Judgment.

In an action for the amount of a deposit made by the plaintiff under an agreement in writing with the defendant, where the plaintiff based his right to recover on the ground that after the execution of the agreement the defendant by fraud

procured from the plaintiff his signature to a second agreement to be substituted for the first, and that thereupon the plaintiff surrendered the first agreement to the defendant who destroyed it, and the case was tried solely on this issue, the plaintiff at first testified that the defendant did not read the new agreement aloud to him, but asked him to sign it. He then testified that the defendant did read it "kind of loud," but that he could not understand it; that the defendant told him nothing about the new agreement but simply asked him to sign it; and that he had no idea why he signed the new agreement or gave up the first one. On redirect examination the plaintiff testified that the defendant read the new agreement to the defendant's bookkeeper; that he could understand him reading it, but testified, "There was no use in my understanding it when I didn't know anything about it." In answer to a question whether the defendant read the agreement so that the plaintiff knew the contents of it, the plaintiff said, "Of course, if I had any understanding about it, or if I was in any way smart or intelligent, I suppose I would have understood it; but I didn't." On re-cross-examination the plaintiff testified that he could not say whether the defendant read the new agreement to him or to the defendant's bookkeeper, and could not say whether the bookkeeper read it to him. There was nothing in the other testimony which added to these statements. *Held*, that there was no evidence to be submitted to the jury that the plaintiff's signature to the second agreement had been procured by fraud on the part of the defendant, and that a verdict should have been ordered for the defendant.

Where at a trial under a declaration in contract or tort, the plaintiff upon the state of facts disclosed by the evidence could not recover upon any count of his declaration without showing fraud on the part of the defendant, and there was no evidence of such fraud to submit to the jury, but the presiding judge refused to order a verdict for the defendant and the jury returned a verdict for the plaintiff, upon an exception by the defendant to such refusal, this court under St. 1909, c. 236, ordered an entry in the trial court of judgment for the defendant.

CONTRACT or TORT for the sum of \$400 paid by the plaintiff to the defendant as a deposit under an agreement in writing dated June 17, 1907, by which the defendant agreed to sell to the plaintiff and the plaintiff agreed to purchase from the defendant a lot of land with a frame dwelling house thereon numbered 287 on West Fifth Street in that part of Boston called South Boston; with three counts, the first alleging fraud on the part of the defendant, the second alleging the conversion by the defendant of \$400, the property of the plaintiff, and the third alleging that the defendant owed the plaintiff \$400 received by the defendant to the plaintiff's use. Writ dated July 12, 1907.

In the Superior Court the case was tried before *Lawton, J.* It appeared that a second agreement of the same date between the defendant and the plaintiff for the sale and purchase of the same house and lot on different terms was signed by the plaintiff and that the first agreement was returned by the plaintiff to the

defendant and subsequently was destroyed. The plaintiff contended that the second agreement was obtained from him by fraud on the part of the defendant, and the case was submitted to the jury on this issue. The evidence is described in the opinion.

At the close of the evidence the defendant asked the judge to make the following rulings:

"1. On all the evidence, a verdict should be found for the defendant.

"2. There is no evidence of fraud or misrepresentation, as alleged in count 1, on the part of the defendant, and a verdict should be found in his favor.

"3. There is undisputed evidence that the plaintiff entered into a written contract with the defendant to purchase the defendant's property; that the plaintiff deposited \$400 under the terms of said contract, and that he neglected and refused to carry out that contract, whereby under the terms thereof he forfeited said \$400, and a verdict should be found for the defendant on all three counts.

"4. There is undisputed evidence that the plaintiff entered into a second written agreement with the defendant for the purchase of the defendant's property, and waived, cancelled and discharged the defendant from the first written agreement, and accepted the second agreement as a substitute therefor, and that in said transaction there was no deceit practised, or misrepresentations made by the defendant, and verdict should be found for him on all three counts."

The judge refused to make any of these rulings and submitted the case to the jury, who returned a verdict for the plaintiff. The defendant alleged exceptions.

The case was argued at the bar in November, 1909, before *Knowlton, C. J., Morton, Braley, Sheldon & Rugg, JJ.*, and afterwards was submitted on briefs to all the justices.

E. N. Carpenter, for the defendant.

D. V. McIsaac, (*W. F. Sheehy* with him,) for the plaintiff.

SHELDON, J. The case was submitted to the jury upon the issue whether the second agreement was obtained from the plaintiff by fraud on the part of the defendant; and the only question presented to us is whether there was evidence to justify a finding

against the defendant on that issue. The contention made by the plaintiff in argument was that the action of the defendant under the circumstances was a representation that this second agreement represented or contained the terms which formerly had been agreed upon, that this representation was false and fraudulent, and that it was this representation that induced the plaintiff to sign the second agreement. But the plaintiff's testimony does not support this contention. He first testified that the defendant did not read the new agreement aloud to him, but asked him to sign it; then that the defendant did read it "kind of loud," but that he (the plaintiff) "couldn't understand it"; that the defendant told him nothing about the new agreement but simply asked him to sign it; that he had no idea why he signed the new agreement or gave up the first one. On redirect examination, he said that Corbett read the new agreement to the defendant's bookkeeper, that he (the plaintiff) could understand him reading it, but "there was no use of my understanding it when I didn't know anything about it." In answer to a question whether the defendant read the agreement so that he (the plaintiff) knew the contents of it, he said: "Of course if I had any understanding about it, or if I was in any way smart or intelligent, I suppose I would have understood it; but I didn't." On re-cross-examination he testified that he could not say whether the defendant read the new agreement to him (the plaintiff) or to the defendant's bookkeeper, and could not say whether the bookkeeper read it to him. We find nothing in the testimony of the other witnesses or in the plaintiff's testimony when called in rebuttal which adds anything to these statements. Manifestly this testimony would not justify a finding that such a fraud as is claimed had been practised upon him by the defendant. There was no representation and nothing to indicate a representation by the defendant that the second agreement represented or contained the same terms which formerly had been agreed upon and had been embodied in the first agreement. Accordingly, upon the contention made at the trial the defendant's first request should have been given; and the defendant's exceptions must be sustained.

The defendant asks us now, under the provisions of St. 1909, c. 236, to direct the entry in the Superior Court of judgment in
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his favor. Under the circumstances we are of opinion that this ought to be done. Most of the false representations averred in the first count of the declaration, the only one which dealt with the subject, were not relied on at the trial, and there was no evidence of the only fraud which was relied on. And the plaintiff could not recover upon any count of his declaration, upon the state of facts which appeared at the trial, without proof of actual fraud on the part of the defendant. The entry must be

Exceptions sustained; judgment to be entered for the defendant.

MINNIE S. YANCEY vs. BOSTON ELEVATED RAILWAY
COMPANY.

Suffolk. November 12, 1909. — February 24, 1910.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Negligence. Street Railway. Practice, Civil, Verdict, Exceptions.

A young woman, who is ignorant of a custom existing in a city where she recently has arrived of entering the rear vestibule of a street car by the door on the right hand side while other cars are being operated on a parallel track at the left of the car, is not necessarily a trespasser in attempting to enter such a car as a passenger by standing upon the step leading to the left hand door of the vestibule, which is closed while the right hand door is open, and rapping on the closed door for admission, and, if she is on the car lawfully, the conductor, when he sees her on the step and knows her evident purpose of entering the car, owes her the duty of exercising reasonable care for her protection until at least an opportunity has been given her to step down in safety.

If a young woman, who is suffering from a dislocation of the hip and is carrying crutches which have been furnished to her to lessen the weight upon her hip in walking, being in a city where she is ignorant of a prevailing rule and custom as to entering the rear vestibule of a street car by the door on the right hand side while cars are being operated on a parallel track at the left of the car, stands upon the step leading to the left hand door of the vestibule of such a car with both hands on the grab irons, holding her crutches, and raps upon the closed door for admission, whereupon the conductor, seeing her there, shakes his head and immediately gives the signal to start the car, and the car starts, throwing the young woman to the ground, in an action brought by her against the corporation operating the railway, for her injuries thus caused, it cannot be ruled as matter of law that the plaintiff was negligent in being upon the step at the time of the accident, as it could not reasonably be anticipated that, if the plaintiff was refused admission on that side of the vestibule, the car would be set in motion instantly without allowing her time to step off.

In an action against a corporation operating a street railway, it appeared that the

plaintiff was a young woman, who was suffering from a dislocation of the hip and was carrying crutches which had been furnished to her to lessen the weight upon her hip in walking, and that, being ignorant of a prevailing rule and custom that where there are parallel street railway tracks in a street a person must enter the rear vestibule of a street car from the right hand side, she got upon the step leading to the left hand door of the vestibule of such a car with both hands upon the grab irons, holding her crutches, and rapped upon the closed door for admission, and that the conductor, seeing her there, shook his head and immediately gave the signal to start the car, whereupon the car started, and the plaintiff, after being carried a short distance, was unable to retain her footing and fell into the street and was injured. *Held*, that there was evidence of wilful misconduct on the part of the conductor, in giving the signal to start the car in such a way as to cause the plaintiff in her crippled condition to fall into the street while it was in motion, which would make the defendant liable even if the plaintiff was a trespasser.

In an action against a corporation operating a street railway, for injuries sustained by the plaintiff in falling from the step of a car of the defendant when the plaintiff had been attempting to enter the car by the left hand door of the rear vestibule, which was closed in accordance with a rule of the defendant, and the conductor on refusing to open the door had given at the same time a signal to start the car, which, being obeyed by the motorman, caused the accident, the jury should be instructed that, if they find that the plaintiff was not in the exercise of due care or was a trespasser upon the car, they can find the defendant liable only by finding that the acts of the conductor amounted to wilful and wanton recklessness toward the plaintiff.

In an action against a corporation operating a street railway in Boston, for personal injuries from being thrown from a step of an electric street car of the defendant, it appeared that the plaintiff was a young woman who suffered from permanent lameness owing to a dislocation of the hip and had been furnished at a hospital, from which she was returning, with crutches to lessen the weight upon her hip in walking. It could have been found that the plaintiff was not familiar with the methods of entering street cars in Boston, that she crossed the street and approached from the left hand side a vestibule car of the defendant which was stopping at a street crossing for the admission of passengers, that the left hand door of the rear vestibule of the car, on the side toward the parallel track, was closed and locked in accordance with a rule of the defendant and some persons were getting on or off on the right hand side of the vestibule where the door was open, that the plaintiff approached the car with the intention of entering it as a passenger, that she stood upon the step leading to the door on the left hand side of the vestibule with both hands on the grab irons, holding her crutches, and rapped upon the closed door, asking for admission, that the conductor saw her, but shook his head and did not open the door and at the same time rang the bell for the car to start, which it did, carrying the plaintiff a short distance, when being unable to retain her footing she fell off into the street and was injured. It further could have been found that the conductor must have understood that the plaintiff was attempting to enter the car for the purpose of becoming a passenger. *Held*, that the plaintiff's mistake as to the method of entering the car, which the jury could find was owing to her ignorance of the rule and custom as to entering from the right hand side, did not necessarily make her presence on the car unlawful, and that, if she was on the car lawfully, the conductor, knowing of her presence and of her evident purpose, owed her the duty of exercising reasonable care for her protection until at least an oppor

tunity had been given her to step down in safety; that it could not be ruled as matter of law that the plaintiff was careless, as it could not have been reasonably anticipated that the car would be set in motion instantly without allowing the plaintiff time to step off; and that there was evidence of wilful misconduct on the part of the conductor in giving the signal to start the car in such a way as to cause the plaintiff in her crippled condition to fall into the street while the car was in motion, which would make the defendant liable even if the plaintiff was not in the exercise of due care or was a trespasser; but that the defendant was entitled to have the jury instructed that to find the defendant liable on this ground the acts of the defendant's servant must be shown to have amounted to wilful and wanton recklessness toward the plaintiff; and, on account of a refusal of the presiding judge to give such an instruction, exceptions of the defendant were sustained after a verdict for the plaintiff.

In an action by a crippled young woman against a corporation operating a street railway, for injuries sustained by the plaintiff in falling from the step of a car of the defendant when the plaintiff had been attempting to enter the car by the door on the left hand side of the rear vestibule, which was closed in accordance with a rule of the defendant, and the conductor on refusing to open the door had given at the same time a signal to start the car, which, being obeyed by the motor-man, caused the accident, the declaration contained two counts, the first count seeking to recover on the ground that the plaintiff was upon the step of the car lawfully and was in the exercise of due care and was injured by reason of the negligence of the conductor, and the second count seeking to recover on the ground that, even if the plaintiff was not in the exercise of due care or was a trespasser, the defendant should be held liable because the accident was caused by the wilful misconduct of the conductor in starting the car while the plaintiff was upon the step without giving her time to get off. There was evidence on which it could have been found that the plaintiff was upon the step of the car lawfully and on which it could have been found that the plaintiff was in the exercise of due care. There also was evidence on which it could have been found that the conductor was negligent or it could have been found that he was guilty of wilful misconduct toward the plaintiff. The presiding judge refused to instruct the jury that, if the plaintiff was not in the exercise of due care or was a trespasser upon the step of the car, the defendant could be held liable only in case the acts of the conductor amounted to wilful misconduct toward the plaintiff. The case was submitted on both counts to the jury, who returned a general verdict for the plaintiff. *Held*, that, as each of the counts stated a good cause of action and the verdict was general, there was no means of knowing on which count the jury had found the defendant liable and had assessed damages; and that, although there was no error as to the first count, the jury might have returned the verdict improperly on the second count, by holding the defendant liable for mere negligence of the conductor, even in case they had found that the plaintiff was not in the exercise of due care or was a trespasser; and therefore that an exception by the defendant to the refusal of the ruling requested must be sustained.

TORT for personal injuries received by the plaintiff from being thrown from a step of an electric street car of the defendant on Cambridge Street in Boston on February 21, 1905. Writ dated March 15, 1905.

The first count of the declaration alleged that while the plain-

tiff was lawfully on one of the cars of the defendant and while she was in the exercise of due care, by reason of the carelessness and negligence of the defendant, its servants and agents in the operation and control of the car she was thrown violently from the car to the ground and was injured.

The second count, added by amendment, alleged that "while the plaintiff was lawfully on one of said cars, and while in the exercise of due care, and while she was in a place of great peril, to wit, on the step of said car, by reason of the gross negligence of the defendant in starting up said car recklessly, wantonly and with gross disregard of the plaintiff's safety, she was severely injured by being thrown violently to the ground."

In the Superior Court the case was tried before *Bond, J.* The plaintiff testified that at the time of the trial, which was in 1909, she was about twenty-five years old; that at the time of the accident she lived in Stoneham, Massachusetts, with her sister; that she came to Boston on February 14, 1905, from Virginia; that she had been lame all her life owing to a dislocation of her hip; that on February 21 she went to the hospital where her hip was examined, and she was given some crutches to relieve the weight upon her hip; that after leaving the hospital she walked with her crutches up the westerly side of Grove Street to Cambridge Street; that when she got to Cambridge Street she crossed to the opposite side of Grove Street; that a Forest Hills car headed easterly, or towards Bowdoin Square, was standing on the opposite side of Cambridge Street; that she went across Cambridge Street toward this car and another car was coming in the opposite direction; that she got on the rear left hand step of the car, which was standing still and that the vestibule door was closed when she got on; that she rapped on the door for the conductor to open the door and he shook his head and then he rang the bell and the car went on; that she was standing on the steps and that the car went about thirty feet, as far as she could guess, and then she was thrown from the car, and that it went about thirty feet again, when it stopped and the conductor came back, and that he and another man picked her up; that when she got on the step the car was standing partly on the cross walk and the other part toward Boston; that when she got on the left hand rear step of the car she did not go around the end of the

car to the step on the other side because another car was coming from the opposite direction; that the other car was coming from Bowdoin Square; that that car was about as far away as across the court room, and it passed by her shortly after she got on the step; that when she stepped on the step the other car was about as far away as across the court room; that the conductor was on the rear platform inside the vestibule of the car that was standing still; that she did not think there was any one there besides the conductor; that, when she fell off, the car was going pretty fast; that the other car was not going so very fast because it was near a stopping point; and that she fell off about thirty feet from the cross walk.

On cross-examination the plaintiff testified that she could walk perfectly well without crutches; that they were given to her to relieve the weight upon her hip so that the abscess might heal, and not because she needed them to assist her in walking; that she could walk all right and had not needed crutches since she was a child; that she had lived in South Bethlehem, Pennsylvania, since 1902, and had travelled a good deal on street cars there; that they got on from both sides there; and that she came there from the South where they did not have street cars.

She further testified on cross-examination as follows:

She had ridden on street cars once in Philadelphia. She had also ridden on them in Boston on February 14 and February 20. She had never visited any other large cities. She was about five feet tall. On February 20 with her sister she took a car for the North Station at the corner of Grove Street and Cambridge Street. On the day of the accident she was alone. There were tracks between her and the car upon which she got. At the time she got on the step people were either getting on or off the rear platform of the car on the other side or right hand side of the vestibule where the door was open. The plaintiff saw the vestibule and knew what a vestibule of a street car was. She saw that the door of the vestibule on the left hand side of the car was closed.

"Q. And of course you saw that before you stepped up there?
A. Well, I thought they kept the doors closed, anyway. — Q. No, not what you thought. You saw that before you stepped up there? A. Yes; I saw the door was closed."

The lower part of the door was solid and the upper part was glass. She saw all this before she stepped on the car. She stepped on the rear step on the left hand side of the car next the other tracks. There was not any car behind the one she got on. She took hold of the grab handles and stepped up on the step where the door was closed. She had both her feet on the step and had hold of the two grab handles with both hands. The conductor was in the vestibule on the other side of the closed door. "I don't think there was any one standing on the rear platform. There were other people there passing back and forth through the vestibule. There were other people on the platform besides the conductor. I rapped on the glass of the door and told him to open the door. The conductor shook his head. I was still standing there. The car stayed long enough for me to rap on the door. He shook his head and then pulled the string of the bell, and the car started pretty fast, but not at first fast enough to throw me off. He rang the bell right off, while he was shaking his head. He shook his head and then rang the bell. It didn't happen all at once — in a few minutes. It didn't happen all together. It stayed there long enough for me to rap on the door. The conductor didn't wait any space of time. He rang the bell as soon as he shook his head. After the car had gone about thirty feet I fell off because I could not hold on any longer."

"Q. What did the conductor do after the car started? Stood there and looked at you riding? A. Yes, he stood there. — Q. And looked at you riding the distance across this room? A. Yes, he stood there. — Q. Didn't do anything? A. No. — Q. Just stood there? A. Yes."

"At that time I had both my feet on the step and both my hands on the grab irons with my crutches." When the car started she did not hear any bell. She stepped up on to the car to get out of the way of the other car that was coming and to get on in the meantime. She got on the step where the door was closed in order to get in the car that way. She thought as long as she was up there that the conductor might open the door and let her in that way. "When I rapped on the door the conductor shook his head. He pulled the rope and then the car started. After I fell the conductor picked me up. He said, 'My God,

what did you get on there for?' I can walk better now than before the accident."

The character of the other evidence is referred to in the opinion, where the findings warranted by the plaintiff's testimony are stated.

At the close of the evidence the defendant asked the judge to make the following rulings :

1. On all the evidence the plaintiff is not entitled to recover.
2. The plaintiff cannot recover upon the first count in her declaration.
3. The plaintiff cannot recover upon the second count in her declaration.
4. Upon all the evidence the plaintiff was not in the exercise of due care.
5. The plaintiff was not a passenger upon the defendant's car at the time of the accident.
6. The plaintiff was a trespasser upon the defendant's car at the time of the accident.
7. The defendant did not owe to the plaintiff that high degree of care it was bound to exercise toward a passenger.
8. The defendant is not liable for any acts which do not amount to wilful and wanton recklessness toward the plaintiff.
9. To establish the degree of negligence on the part of a defendant necessary for the plaintiff to recover, the plaintiff must show intentional, wilful wrong. The conduct of the defendant's agent must be criminal or *quasi* criminal. If it results in the death of the injured person, he is guilty of manslaughter.
10. The evidence does not show wilful and wanton disregard of the plaintiff's rights by the defendant, its agents or servants.
12. Even if the conductor did start the car after the plaintiff boarded it there was no such probability that injury would result to her as to make his act reckless or wanton.
13. The defendant is not liable for a mere error of judgment on the part of the conductor.

The judge refused to make any of these rulings, although he gave in substance the fifth and seventh, and submitted the case to the jury with other instructions, to which the defendant excepted so far as they were inconsistent with any of the rulings requested.

The jury returned a general verdict for the plaintiff in the sum of \$2,500; and the defendant alleged exceptions.

F. H. Chase, for the defendant, submitted a brief.

W. H. Sullivan, for the plaintiff.

BRALEY, J. The plaintiff, although a young woman, suffered from permanent lameness, owing to a dislocation of the hip. In walking, to lessen the weight upon this hip where an abscess had formed, she had been provided with crutches at the hospital from which she was returning to her home at the time of the accident. The car she intended to take had stopped, and remained standing at a cross walk, with the right hand rear door of the vestibule open on the side next to the street, through which passengers were entering, while the conductor stood on the platform. But the vestibule door next to the double track was closed. If the evidence of the witnesses as to the conduct of the plaintiff and the conductor cannot be reconciled, the jury could find from the plaintiff's testimony that she crossed the street in her line of travel with the intention of taking passage and, approaching the car from that side, stood upon the step, with both hands on the grab irons, holding her crutches, and rapped upon the closed door, and asked for admission, but, although she was seen by the conductor, he shook his head and did not open the door. A further finding would have been warranted, that, even if she was seeking to get on from the farther side of the platform, he must have understood she was attempting to board the car for the purpose of becoming a passenger. But while from his uncontradicted evidence it appeared, that under a rule of the defendant the left hand rear door in the direction in which the car moves is always kept closed and locked, and only the door on the right is used for the entrance and exit of passengers, a momentary mistake as to the method of entrance, of which the jury could find she was ignorant, did not make her presence on the car wrongful, in the sense that her act up to the time of refusal was an intentional invasion of the defendant's possession and control. *Severy v. Nickerson*, 120 Mass. 306. *Plummer v. Dill*, 156 Mass. 426. See *Hogner v. Boston Elevated Railway*, 198 Mass. 260, 270. The fact that the plaintiff technically was a trespasser did not absolutely relieve the defendant from the duty to observe proper care toward

her or in exercising its own rights so to act as not to injure her unnecessarily. *Lovett v. Salem & South Danvers Railroad*, 9 Allen, 557, 562. The car had been stopped for the reception of passengers, and if it were found that the defendant's servant knew not only of the plaintiff's presence but of her evident purpose, the defendant owed the plaintiff the duty of exercising reasonable care until at least an opportunity had been given in which she might safely step down. *Aiken v. Holyoke Street Railway*, 184 Mass. 269. *Robertson v. Boston & Northern Street Railway*, 190 Mass. 108. *Hogner v. Boston Elevated Railway*, 198 Mass. 260, 270. *Donovan v. Hartford Street Railway*, 65 Conn. 201. *Dale v. Brooklyn City, Hunter's Point & Prospect Park Railroad*, 1 Hun, 146; *S. C.* 60 N. Y. 638. *Kelly v. Consolidated Traction Co.* 33 Vroom, 514, 516.

In the description of what followed, if the jury believed the plaintiff, the conductor simultaneously with shaking his head started the car, causing her to be carried a short distance when, being unable to retain her footing, she fell off into the street. It was properly left to the jury to decide whether the conductor was so negligent as to make the defendant liable. Nor could it have been rightly ruled as matter of law, that the plaintiff was careless. It could not have been reasonably anticipated that under such conditions the car would be instantly set in motion. Upon discovery that she had made a mistake when the door was not opened, it could be found that she might assume that the conductor, knowing her perilous position, would not immediately give the signal to start, but would allow her time to step off.

The defendant's requests for rulings, with the exception of the second and third, make no reference to the different counts. The first count does not allege that the plaintiff was a passenger, but charges the defendant with negligence in the management of the car, and, the evidence being applicable to that count, no error appears in the refusal to give the defendant's first, second, fourth and twelfth requests; but the sixth request should have been given. Nor should the thirteenth request have been granted. It was not asserted by the plaintiff that an error of judgment had been made in starting the car, but that it was knowingly started with a disregard to her safety, and the defend-

ant's evidence was simply a denial of the plaintiff's statement as to the place and cause of the accident. Besides, the jury were plainly told that, if it happened elsewhere and under entirely different conditions, as the defendant contended, the plaintiff could not recover.

The fifth and seventh requests, while correctly stating the law, were fully and accurately covered by the instructions. *Graham v. Middleby*, 185 Mass. 349.

The second count alleged gross negligence of the defendant in starting the car recklessly and wantonly with gross disregard of the plaintiff's safety, and the defendant excepted to the refusal to give the third, eighth, ninth, tenth and twelfth requests. We have said that there was evidence for the jury of the defendant's negligence, and a further inference of fact could have been drawn by the jury, that the conductor, with full knowledge of the situation of the plaintiff, although he might not have fully appreciated her bodily infirmities, gave her no opportunity to alight. The use of unreasonable force, where under the circumstances life or limb may be endangered, can be found to be wilful or reckless and wanton. A trespasser even cannot be wilfully molested, and dealt with to his harm and injury. *Planz v. Boston & Albany Railroad*, 157 Mass. 377. The conductor, as the defendant's servant, was in charge of the car, and the defendant was responsible for his acts. *Holmes v. Wakefield*, 12 Allen, 580. *Young v. South Boston Ice Co.* 150 Mass. 527, 528. Deliberately and without warning to start the car at a speed, which the jury might find would compel the plaintiff in her crippled condition to fall into the street while it was in motion, resulting perhaps in loss of life itself, the jury could say constituted such a disregard of consequences, which reasonably should have been anticipated, as to amount to wilful misconduct. *Gordon v. West End Street Railway*, 175 Mass. 181. *Aiken v. Holyoke Street Railway*, 184 Mass. 269. *Banks v. Braman*, 188 Mass. 367 (192 Mass. 162, note). *Black v. New York, New Haven, & Hartford Railroad*, 193 Mass. 448, 452. See *Spooner v. Old Colony Street Railway*, 190 Mass. 132. The denial of the third, tenth and twelfth requests afforded no ground of exception.

By the eighth and ninth requests the attention of the court was directed to the nature of proof required to sustain the alle-

gations of the second count. If not called upon to instruct in the language requested, appropriate instructions as to the liability of the defendant under this count were necessary to a correct understanding by the jury of the issue. In the charge no reference whatever is found to the distinction under our decisions between negligence as ordinarily defined and the wilful misconduct which the plaintiff alleged. *Black v. New York, New Haven, & Hartford Railroad*, 193 Mass. 448, 452. The counts are not defective, as each states a good cause of action, and, the verdict being general, there is no means of knowing on which one the jury found the defendant liable, and assessed damages. *James v. Boston Elevated Railway*, 201 Mass. 263, 265. The jury, to the defendant's prejudice, having been improperly left to infer that the plaintiff, even if she was not in the exercise of due care or was a trespasser, could recover if the conductor was shown to have been merely negligent, the exceptions to the refusal to give these requests must be sustained. *Bride v. Clark*, 161 Mass. 130.

We do not find it necessary to consider the exceptions to the instructions dealing with portions of the testimony, or to the refusal to give certain instructions asked for at the close of the charge. The questions presented may not arise at the second trial, or, if raised, may assume an entirely different aspect.

Exceptions sustained.

BERNARD J. RUDDY vs. GEORGE F. BLAKE MANUFACTURING
COMPANY.

Suffolk. January 8, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Employer's liability. Agency, Scope of employment. Pleading, Civil, Declaration.

Where a part of a machine which is operated by compressed air starts into motion of itself, when if it was in proper condition it would remain stationary, and in thus moving causes an injury to a workman employed by the proprietor of the machine to work in connection with it, in an action at common law by the workman against his employer for his injuries thus caused, the fact of the automatic starting of the portion of the machine, if unexplained, tends to show that the

apparatus in some way had become defective, and, if this fact is supported by evidence that for some time before the day of the accident the part of the machine which thus started into motion had been seen to be working irregularly and badly and that notice of its condition had been given to the defendant's superintendent, there is evidence for the jury of negligence on the part of the defendant.

In an action by a workman employed in a foundry against his employer, for personal injuries sustained by reason of one of his hands being caught and crushed between a car about which he was working and the door of an oven, it appeared that the plaintiff worked in a part of the defendant's foundry called the core room, where there were six or eight ovens side by side used for the baking of cores, that the cores were made of sand mixed with flour and other substances and were shaped to go inside of moulds so that in making hollow castings the molten metal might be poured in between the mould and the core, that the cores were mixed and put in shape in a part of the core room which was at a considerable distance from the ovens, that when this had been done they were carried by the workmen to the place where the ovens were, and were placed by the workmen upon cars, and that when the cars were loaded they were run into the ovens, where the cores received the necessary baking, that on the day of the accident a core broke while it was being carried from the moulding department to the pasting department, and that the superintendent of the core room said to the plaintiff, "there is a main core for a steam cylinder coming back, that broke in rolling off, and I want you to get it pasted as quick as you can and into the oven for the day's heat." It was undisputed that from the nature of the break and the temperature of the core great care would be necessary to adjust and keep the parts together until it could be placed on the car and run into the oven, where the heat would cause the parts to fuse and adhere firmly. The accident occurred while the plaintiff was obeying this order, and the defendant contended, that it was not liable, because the plaintiff in undertaking to run the car into the oven was a mere volunteer and was not acting within the scope of his employment. *Held*, that the acts of the plaintiff in accompanying the core to the oven were necessary for its safe carriage, and were within the scope of the order, which it was his duty to obey.

In an action at common law by a workman against his employer for personal injuries sustained while in the employ of the defendant, a count alleging a defect in a machine in connection with which the plaintiff was working is not inconsistent with another count for a failure of the defendant to give notice to the plaintiff of the danger incidental to the use of the defective machine.

In an action at common law by a workman for personal injuries sustained while in the employ of the defendant, if the plaintiff shows that a representative of the defendant ordered him to perform work which involved the use of a defective machine without giving him any warning or information of a concealed danger owing to such defect, of which the plaintiff could be found to have been ignorant but of which the defendant's representative knew or should have known, there is evidence for the jury of negligence on the part of the defendant.

In an action at common law by a workman against his employer for personal injuries alleged to have been caused by a part of the machine in connection with which the plaintiff was working starting of itself, when if it had been in proper condition it would have remained stationary, if there is evidence that a fellow servant of the plaintiff, with the plaintiff's assistance, attempted to start this part of the machine with bars or attempted to use this part of the machine after he knew that it was not in repair, this does not deprive the plaintiff of his

right to go to the jury, if there is other evidence warranting a finding that the proximate cause of the automatic movement of the part of the machine was a defect in its mechanism, of which the defendant ought to have known and of which the plaintiff did not know and was not warned.

TORT for personal injuries sustained by the plaintiff while in the employ of the defendant at its foundry at East Cambridge on October 14, 1903, by reason of one of his hands being caught and crushed between a car about which he was working and the door of an oven, with two counts, both at common law, the first alleging that the plaintiff's injuries were caused by reason of the negligence of the defendant, through its agents and servants, in failing to supply him with safe and suitable apparatus, tools and appliances for the performance of the work upon which he was engaged, and the second alleging that his injuries were caused by reason of the negligence of the defendant, through its agents and servants, in failing to give him sufficient warning of the dangers incident to the work which he was performing, and that the defendant, through its agents and servants, knew, or ought to have known of such dangers, but that the plaintiff was wholly ignorant of such dangers. Writ dated April 14, 1904.

In the Superior Court the case was tried before *Bond, J.*

At the trial it appeared that, at and before the time of the accident, the plaintiff was in the employ of the defendant, and that the defendant had in the part of its foundry known as the core room six or eight ovens side by side, which were used for the baking of cores. These cores were made of sand mixed with flour and other substances, and were shaped to go inside of moulds, so that the molten metal might be poured in between the mould and the core in making hollow castings. The cores were mixed and put in shape in another part of the core room at a considerable distance from the ovens. After this was done, they were carried by the workmen to the place where the ovens were. If small and light they were carried by hand or on trucks, but if large and heavy they were carried by movable cranes. Upon reaching the place where the ovens were they were placed by the workmen upon carriages or cars, and when the carriages were loaded they were run into the ovens, where the cores received the necessary baking.

The ovens were built of brick and each had a large doorway

opening toward the carriage. This doorway was about six or seven feet wide and eight or nine feet high. The oven was nine or ten feet deep. The carriage was of iron and was supported by four wheels or trucks which ran on iron tracks or rails, leading into the oven. The carriage was nine or ten feet long and six or seven feet wide. It consisted of an iron framework resting on the wheels or trucks, and supporting two iron platforms, one above the other, made of iron slats or rails, upon which the cores were placed. At each end of the carriage was attached a large iron door, of a proper size to shut up against the doorway of the oven and close it. When the carriage was drawn out of the oven as far as it would go, the iron door upon the end of the carriage nearest the oven came up against the inside of the doorway, thus closing it. When the carriage was run into the oven as far as it would go the iron door at the other or outer end came up against the outside of the doorway, closing it. The doorway thus was closed at all times by one or the other of the doors attached to the ends of the carriage, except while the carriage was being moved out or in.

The carriage was operated by compressed air, the mechanism for doing this being as follows: A piston rod was bolted firmly to the end of the carriage farther from the oven. This piston rod ran into a cylinder where a piston head was attached to it, the length of the rod and the length of the cylinder being such as to give the piston a backward and forward stroke equal to the entire length of the carriage. The bore of the cylinder was eight inches in diameter and the piston head was fitted closely into this by leather packing. The piston rod fitted closely the head of the cylinder towards the carriage, and was made tight by packing.

Compressed air was let into either end of the cylinder through tubes. When the air was let into the end of the cylinders farther from the carriage it drove the piston forward, pushing the car into the oven. When the air was let into the other end of the cylinder it drove the piston backward, pulling the carriage out from the oven. Valves, operated by hand, permitted the workman operating the carriage to let the air into or out of the cylinder at either end, at will. These valves were on the face of the oven wall, near the doorway, within convenient reach.

The tubes through which the air was let into the cylinder were one inch in diameter.

Upon the ends of the cylinder there were also pet cocks three quarters of an inch in diameter, through which, when opened, the compressed air in the cylinder could escape. The air was compressed by the engine into tanks or holders, which were in the engine room some distance away. From these tanks it was carried to the carriages, above described, as well as to many other machines in different parts of the foundry by tubes. There were three of these compressed air tanks ordinarily in use, but there was evidence tending to show that only two of them were in use on the day of the accident, the other being under repair.

The plaintiff testified: "I am somewhere around fifty years old, and had worked for the last thirty years off and on as a core maker. I have worked in foundries most of the time for thirty years. Before I came to work for the defendant I had worked for the Slater Engine Company, in Warren, Massachusetts. I had charge of the core room there about five years. I worked at five or six different foundries before I went to the defendant's, — in most of them at core making. In the places I worked before the defendant's, they had ovens for baking cores, but the cores were put into the ovens by hand, or if we could not shove them in by hand we had to use a bar. The cores are made of a sand mixture, and we use molasses or stale beer with flour or rye meal to make the sand stick together. After the cores are made, they are dried and put in the oven. Then they are taken out and pasted. If the core is hot enough so you can paste it, it will dry the blacking and there is no need of putting it back again; but if the core is cold they generally put it back.

"This core was what we call a main core, for a steam cylinder. I would take it to be about twenty or twenty-four inches in diameter. It was round, with a small end which extended out from it about six or eight inches. It was about the size of a flour barrel, but straight, and the small projection led out from the centre of each end. I had nothing to do with making the core. I first saw it when it came back.

"I had charge of what they call the pasting department of the core room. I had nothing to do with making cores at that time. I had worked at core making from the latter part of July until

some time in September. For about a month before the accident I had charge of the pasting. There were five or six men under me."

The evidence in regard to the happening of the accident is described in the opinion.

At the close of the evidence, the defendant asked the judge for twenty-six rulings or instructions. Among those which were refused by the judge were requests to rule that upon all the evidence the plaintiff was not entitled to maintain his action, that the plaintiff was not entitled to maintain his action on the first count, and that he was not entitled to maintain it on the second count. The fourth instruction requested by the defendant, which it was stated in the bill of exceptions that the judge gave in substance, was that the defendant could not be held responsible in this action for any negligence of James O'Leary, a fellow workman of the plaintiff who is mentioned in the opinion. The twentieth and twenty-first instructions requested, the exceptions to the refusal of which were not argued by the defendant, were as follows:

"20. Upon the evidence in this case, unless the jury find that the valve used for shutting off the air pressure was in a leaky and defective condition, they would not be warranted in finding that there was a defect in the machine which caused the injury to the plaintiff.

"21. In order to entitle the plaintiff to maintain his action upon the first count, the jury must be satisfied by a fair preponderance of the evidence that the valve by which O'Leary attempted to shut off the air pressure, was in a leaky condition and that this leaky condition of the valve caused the injury to the plaintiff."

With the exception of the fourth instruction requested, the judge refused to give any of the instructions requested by the defendant except so far as they were incorporated in a portion of his charge set forth in the bill of exceptions.

Near the beginning of the portion of the charge thus set forth was the following: "The plaintiff must show by a fair preponderance of the evidence that at the time he was injured he was acting in the line of his duty as an employee; that in all which he did which related to his injury he was in the exercise of due

care ; that the accident was not due to some risk or danger which he assumed while so employed, and that his injury was due to the failure of the employer to perform the duties imposed by law upon the employer for the safety of the plaintiff ; and if he fails to satisfy you upon either one of these propositions, then he is not entitled to recover."

The portion of the charge set forth concluded as follows : "So that you will consider here fully all the evidence, and say whether or not the plaintiff has made out all these different propositions. I have repeated to you the propositions twice, so that I think you will be able to keep them all in mind : Whether or not he was acting in the line of his duty, whether he was in the exercise of due care, whether it was a danger that he knew of and assumed when he was working, and whether or not he has satisfied you that this injury to him was caused by a failure of the defendants to perform the duty which the law imposed upon the defendants with reference to the safety of the plaintiff when he was doing his work. If you say that he has made out all these, then he is entitled to recover. If he has not made them all out, then he is not entitled to recover, and you must find for the defendant."

At the close of the charge the defendant further excepted to that portion of the charge in which the judge "charged the jury in substance that when an appliance fails to work in the way it was intended to work, when used as it was intended to be used, that that is some evidence that the machine is in a defective condition, and some evidence of negligence in some person not keeping it in repair."

The judge submitted the case to the jury, who returned a general verdict for the plaintiff in the sum of \$3,500. The defendant alleged exceptions.

The case was submitted on briefs.

G. L. Mayberry, for the defendant.

D. H. Coakley & R. H. Sherman, for the plaintiff.

BRALKY, J. It was the defendant's duty to furnish suitable appliances for the plaintiff's use in the performance of his work, and to keep them in proper repair. In the management of its business, while the supervision of details could be left to competent subordinates, this requirement could not so be delegated as

to relieve the defendant from responsibility for injuries caused to its servants by defective permanent machinery or appliances, where by the exercise of reasonable diligence it should have known of and remedied the defect. *Rogers v. Ludlow Manuf. Co.* 144 Mass. 198. *Feeney v. York Manuf. Co.* 189 Mass. 336. *Finnegan v. Winslow Skate Manuf. Co.* 189 Mass. 580. *Donahue v. C. H. Buck & Co.* 197 Mass. 550.

The car which caught the plaintiff's hand and pinned it against the wall of the heated oven was operated by compressed air, admitted to the cylinder, and controlled by a valve. If in proper condition, it moved in or out of the oven at the will of the operator. After the plaintiff had mended the broken core it was placed on the car, and preparations were made to run the car into the oven, where the core was to be baked. The air having been turned on, the car started, but instead of moving steadily forward, after going a short distance it stopped. The air was then turned off, and the pet cock at the end of the cylinder was opened, and bars were used under the wheels to put the car in motion, when it suddenly shot ahead, causing the accident. Upon plenary evidence not only from the plaintiff's fellow workmen, who were familiar with the use of the car, but also from experts who were fully acquainted with its mechanism, the car should have remained stationary after the air had been shut off with the pet cock open. But, these precautions having been taken, and the car having been operated in the usual way, the fact that it automatically started furnished evidence which unexplained tended to prove that the apparatus in some way had become defective. *Ryan v. Fall River Iron Works Co.* 200 Mass. 188, 190, 191. *Silverman v. Carr*, 200 Mass. 396, 398.

The twentieth and twenty-first requests have not been argued, but if there was evidence that a leaky or defective valve would be a sufficient cause of the accident, the plaintiff was not limited to proof of this defect. *Cahill v. New England Telephone & Telegraph Co.* 193 Mass. 415, 418, and cases cited. The jury might have been satisfied that, unless the apparatus controlling the motive power was out of order, the car would not have moved. *Ryan v. Fall River Iron Works Co.*, *ubi supra*. *Silverman v. Carr*, *ubi supra*. *Gillis v. Cambridge Gas Light Co.* 202 Mass. 222. It appeared, moreover, that for some time before the day

of the accident the car had been observed to work irregularly, or as described by the assistant foreman, "the carriages were working very badly. . . . they were bucking," and notice of their condition had been given to the defendant's superintendent of the foundry. The question of the defendant's negligence under the first count was properly left to the jury. *Finnegan v. Winslow Skate Manuf. Co.* 189 Mass. 580, 582. *Donahue v. C. H. Buck & Co.* 197 Mass. 550.

Under the second count the negligence of the defendant is alleged to consist in setting the plaintiff to perform work of whose dangers he was ignorant, but of which the defendant was informed, without giving him any warning of the perils of his position. By his contract of employment the plaintiff worked in the pasting department of the core room, where his duties required him to see that cores after having been baked were properly pasted and measured, but he was not required ordinarily to assist in operating cars, or to attend at the ovens. On the day of the accident a core while being carried from the moulding to the pasting department broke, and O'Donnell, the superintendent of the core room, said to the plaintiff, "there is a main core for a steam cylinder coming back, that broke in rolling off, and I want you to get it pasted as quick as you can and into the oven for the day's heat." It was undisputed that from the nature of the break and the temperature of the core great care would be necessary to adjust and keep the parts together until it could be placed on the car and run into the oven, where the heat would cause the parts to fuse and adhere firmly. In obeying this order, the defendant contends, that under each count it is not liable, because the plaintiff was a mere volunteer. He had been employed by O'Donnell, to whose direction and control he was subject, and who acted as the representative of the defendant in the management of the core room and the preparation of the cores for use, which included annealing. *Feecey v. York Manuf. Co.* 189 Mass. 336, 339. *Reardon v. Byrne*, 195 Mass. 146. *Gilman v. Eastern Railroad*, 13 Allen, 433. *Cooney v. Commonwealth Avenue Street Railway*, 196 Mass. 11. The jury could find that the acts of the plaintiff in accompanying the core to the oven were necessary for its safe carriage, and were within the scope and exigency of the order. It appeared,

that the superintendent knew or could be found to have known of the bucking of the cars, and that if the apparatus supplying the compressed air was out of repair, the plaintiff in obeying his instructions, might be exposed to great danger. In *Rice v. King Philip Mills*, 144 Mass. 229, 237, Field, J., said, "If the master knew, or under the circumstances ought to have known, that a machine in use was out of repair and dangerous, it was his duty to see that it was put in proper repair, or to warn those using it of the danger, if they were ignorant of it." A count for defective machinery is not inconsistent with a count for failure to give notice to an employee of the danger which may arise from using it, if it appears that he is ignorant of its condition. The risk is an extraordinary one which the servant does not assume, unless it is obvious, or his attention has been called to it. *Ciriack v. Merchants' Woolen Co.* 151 Mass. 152. The duties are alternate. Suitable appliances must be provided, but, if they are not furnished or become defective, the master must warn or instruct his servants who use them, where through inexperience, want of capacity, or because the danger is concealed, they are not aware of the risks to which they may be exposed. *Haggbloom v. Winslow Bros. & Smith Co.* 198 Mass. 114. *Byrne v. Learnard*, 191 Mass. 269. The defendant could act only by subordinates, whom it had clothed with authority to carry on the different departments. *Gilman v. Eastern Railroad Co.* 13 Allen, 433. *Feeney v. York Manuf. Co.* 189 Mass. 336, 339. To direct the performance of work which involved the use of defective machinery, without giving any warning or information as to the danger of which the plaintiff could be found to have been ignorant, but of whose unsuitableness the defendant's representatives either knew or should have been aware, would warrant a finding by the jury of its negligence. *Ferren v. Old Colony Railroad*, 143 Mass. 197. *Rice v. King Philip Mills*, 144 Mass. 229. *Byrne v. Learnard*, 191 Mass. 259. *Reardon v. Byrne*, 195 Mass. 146.

Nor could it have been ruled as matter of law that the plaintiff assumed the risk, or by his own want of care contributed to the injury. The evidence, if believed, very plainly showed no previous knowledge of defects which were not obvious, but concealed, or of any information which should have led him to anticipate, that the car might work improperly.

If O'Leary, the plaintiff's fellow servant, with the plaintiff's assistance, attempted to start the car with bars, or to use it after he knew it was not in repair, the defendant would not be responsible for his acts. But the jury, who were accurately instructed upon this point, would be warranted in finding upon the evidence that the proximate cause of the sudden movement of the car was the defective mechanism. *Hale v. New York, New Haven, & Hartford Railroad*, 190 Mass. 84. *Butler v. New England Structural Co.* 191 Mass. 397. *Doe v. Boston & Worcester Street Railway*, 195 Mass. 168.

The defendant presented a large number of requests for rulings of which the judge gave the fourth in substance, but declined to give the other requests except as they were contained in the charge. It is unnecessary to take them up in detail. For reasons previously stated they were properly refused, and the instructions given, to a part of which the defendant also excepted, were correct and appropriate.

Exceptions overruled.

MARTIN O'BRIEN vs. LEXINGTON AND BOSTON STREET RAILWAY COMPANY.

Middlesex. January 10, 11, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, In use of highway.

If a servant of a farmer, who is driving a pair of large and heavy horses attached to a wagon containing a heavy load of swill, turns diagonally across the single track of a street railway for the purpose of entering a driveway leading from the street to the farm of his employer, and as he turns looks back and sees a coal car on the street railway near the top of a hill about four or five hundred feet distant, which is approaching from behind on a down grade with an unobstructed view, and, instead of attempting to turn back, he continues to cross the track, still looking at the approaching car, and nods his head to the motorman in a way that can be interpreted to mean that, he, having miscalculated the distance or having failed to appreciate the rate of speed of the car, hopes that the motorman can stop or retard the car so as to avert a collision or lessen its force, and thereupon the car, moving at an excessive rate of speed which is not diminished, strikes the team, killing one of the horses and injuring the

wagon, in an action by the farmer against the corporation operating the car for the loss of and injury to his property, the question whether the plaintiff's servant was in the exercise of due care is for the jury.

TORT by a farmer for the loss of a horse and injuries to another horse and a wagon of the plaintiff from being run into from behind by a coal car of the defendant on Waltham Street in Lexington on August 31, 1904, when a servant of the plaintiff was driving a pair of large and heavy horses attached to the wagon, which contained a heavy load of swill, across the single track of a railway of the defendant in that street, in attempting to enter a driveway leading to the plaintiff's farm, the collision being alleged to have been caused by the negligence of the motorman of the defendant in operating the car at a high rate of speed which he failed to diminish when he saw the plaintiff's servant driving across the track ahead of him. Writ dated October 17, 1904.

In the Superior Court the case was tried before *Stevens, J.* At the close of the evidence the defendant asked the judge to rule that the plaintiff was not entitled to recover. The judge refused to make this ruling, and submitted the case to the jury, who, as shown by the record of the Superior Court, returned a verdict for the plaintiff in the sum of \$512.50. The defendant alleged exceptions.

J. N. Clark, for the defendant.

J. T. Connelly, for the plaintiff.

BRALEY, J. If, in the absence of any such statement in the bill of exceptions, we assume that the plaintiff obtained a verdict, the question for decision is, whether upon the evidence introduced by the plaintiff the trial judge could have ruled as requested by the defendant, that as matter of law the action could not be maintained. The plaintiff's servant, who was driving a heavily loaded team, and the defendant's motorman in charge of its coal car were lawfully using the street in common, and it was the motorman's duty to pay reasonable attention to the presence of travellers and to avoid collisions. *O'Brien v. Blue Hill Street Railway*, 186 Mass. 446. *Stubbs v. Boston & Northern Street Railway*, 193 Mass. 513. *Fallon v. Boston Elevated Railway*, 201 Mass. 179, 182. *Wright v. Boston & Northern Street Railway*, 203 Mass. 569. The team had reached a point in the

line of travel, where it began to turn diagonally to pass over the track into the driveway leading from the street to the plaintiff's farm. In their description of what followed the witnesses are substantially in accord. The jury from the evidence would have been warranted in finding that the driver looked as he turned and saw the car, which was then near the top of the hill about four or five hundred feet distant, moving on a down grade, with the view unobstructed. It was evident he must choose one of two alternatives, either to turn back, if that were possible, and wait for the car to pass, or to go forward. While confronted by this situation he well might assume that the motorman, who could be found to have seen the movements of the team, would slacken speed, instead of apparently keeping on without making the slightest effort to check it. The exceptions further recite, that as the driver saw the car coming, he not only continued to look, but nodded his head to the motorman. This conduct could be interpreted by the jury as meaning, that having miscalculated the distance, or failing to realize the speed of approach, upon perceiving his imminent peril he hoped the motorman by an application of the brakes could avert the collision or lessen its force. If in connection with the presumption that the motorman would not act carelessly, the driver also assumed that the team safely could cross, it was for the jury to determine whether in making an error of judgment, as the event proved, he acted differently from the average man called upon to face similar conditions, and to decide at once what course should be pursued. *Kerrigan v. West End Street Railway*, 158 Mass. 305. *Hennessey v. Taylor*, 189 Mass. 583, 585. *Jeddey v. Boston & Northern Street Railway*, 198 Mass. 232, 235. Travellers on foot or by carriage are required only to exercise ordinary care when using the public ways to avoid defects therein or collisions with passing vehicles. *Hennessey v. Taylor*, 189 Mass. 583. *Wakefield v. Boston Coal Co.* 197 Mass. 527, 530. And it often has been pointed out, that street cars, while they must run on tracks provided for them, have no exclusive right of way which puts upon persons travelling otherwise the burden of constantly looking and listening for their approach so that, if they fail to do so and are injured, their conduct invariably should be held to preclude recovery. *Wright v. Boston & North-*

ern Street Railway, 203 Mass. 569. *Eldredge v. Boston Elevated Railway*, 203 Mass. 582. The defendant urgently calls our attention to the cases of *Willis v. Boston & Northern Street Railway*, 202 Mass. 463, *Beirne v. Lawrence & Methuen Street Railway*, 197 Mass. 173, *Fitzgerald v. Boston Elevated Railway*, 194 Mass. 242, *Tognazzi v. Milford & Uxbridge Street Railway*, 201 Mass. 7, and *Smith v. Boston Elevated Railway*, 202 Mass. 489, as supporting its contention, but they do not disclose a similar state of facts. A majority of the court were of opinion in *Tognazzi v. Milford & Uxbridge Street Railway* that the failure of the plaintiff, who was driving a covered wagon with openings in the sides and had passed from a cross street over the track after looking without seeing a car, again to look as he turned to cross the track a second time to go into his own yard, when by so doing he could have avoided the car, was such negligence as to bar the action. In *Smith v. Boston Elevated Railway*, the plaintiff, a pedestrian, after having seen the car, left the crosswalk, and without again looking, proceeded along the side of the track for some distance with his back to the advancing car, by which he was struck. If in the other cases it was held, that, although the plaintiff testified he looked but did not see a car which the court said he should have seen, he was not entitled to go to the jury on the question of his due care, the undisputed evidence in the present case shows, that the driver "looked towards the car and heard the car . . . when he started to turn in." If by reason of the distance he failed to appreciate the danger, and ordinarily but for its excessive rate of speed he could have gone over the track in safety, or whether he should have taken further precautions, were questions of fact upon all the evidence. Our attention has not been called to any case, and we know of none, where it has been said, that evidence of this nature can be disregarded, or the credibility of witnesses, and the probative effect of evidence from which more than one conclusion of fact may be properly drawn, can be taken from the jury and treated as only presenting a question of law. The defendant while not conceding, does not question, that there was evidence of its negligence, and the due care of the plaintiff's servant having been properly submitted to the jury, the exceptions must be overruled.

So ordered.

MOSES M. COHEN vs. OLIVER AMES & others, trustees.

Suffolk. January 11, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Agency, Broker's commission, Double employment. Broker.

In an action by a real estate broker to recover a commission for procuring a tenant for certain premises of the defendant, where the plaintiff introduces evidence tending to prove that the defendant employed him to procure such a tenant and that the plaintiff brought to the defendant a person who was able, willing and ready to become a tenant of the premises on the defendant's terms, and that the defendant agreed to accept this person as a tenant but afterwards refused to give him a lease, if the person thus alleged to have been procured by the plaintiff as a tenant testifies that, when the premises in question were occupied by another tenant, he told the plaintiff that he would give him \$500 if he would secure a lease of the premises for him, this is not a sufficient ground for ordering a verdict for the defendant, because the jury may not believe the testimony, or may find that there was merely a promise or an offer of a promise which never was accepted by the plaintiff, so that at most the question whether there was a double employment which would prevent the plaintiff from recovering is one of fact for the jury.

A real estate broker, who is employed by a landowner merely to procure a tenant for certain premises, becomes entitled to a commission if he procures a customer who is able, willing and ready to become a tenant of the property upon the terms fixed by the owner and the owner accepts the customer as a tenant, and if the owner afterwards refuses to give a lease or otherwise to carry out the transaction, this does not affect the broker's right to his commission.

In an action by a real estate broker to recover a commission for procuring a tenant for certain premises of the defendant, there was evidence on which it could have been found that the plaintiff was employed by the defendant to see a certain person and bring him to the defendant and that it was agreed that, if the defendant accepted this person as a tenant when brought to him by the plaintiff, the plaintiff should be paid the ordinary broker's commission, that the person was so brought by the plaintiff and was accepted by the defendant as a tenant, who began to make out a lease to him which the proposed tenant was ready to accept and comply with, but that, objection being made to the proposed tenant by other tenants in the defendant's building, the defendant refused to give him any lease or to let him into the building. *Held*, that the plaintiff was entitled to go to the jury.

CONTRACT, by a real estate broker for \$1,275 as a commission of one per cent for securing a tenant for certain premises in a building owned by the defendants numbered 68 on Bedford Street in Boston for a term of fifteen years at the rate of \$8,500 a year. Writ in the Municipal Court of the City of Boston dated August 1, 1906.

On appeal to the Superior Court the case was tried before *Hardy, J.* The evidence of the plaintiff tended to prove that the plaintiff was employed in behalf of the defendants by one Cole to secure as a broker a tenant for the property in question, which the defendants owned as trustees, that the plaintiff brought to the defendants one Wyman who was able, willing and ready to become a tenant of the property on the defendants' terms, and that a lease on their terms was agreed upon between Wyman and the defendants, which the defendants afterwards refused to execute. The findings which were warranted by the evidence are stated in the opinion.

The testimony of Wyman in regard to his offering to pay the plaintiff for procuring a lease, which is referred to in the opinion, was that while the premises were occupied by certain tenants who went into bankruptcy Wyman tried to buy their lease from them before they failed, and that before they had decided not to continue in business he told the plaintiff that he would give him \$500 if he would secure a lease of the premises for him.

At the close of the evidence the judge ordered a verdict for the defendants; and the plaintiff alleged exceptions.

M. M. Johnson, for the plaintiff.

A. F. Clarke, for the defendants.

SHELDON, J. 1. It could not be ruled as matter of law that the plaintiff must fail in this action because he was to be paid by Wyman for procuring a lease from the defendants, and so had an individual interest adverse to that of the defendants, under the doctrine of *Sullivan v. Tufts*, 203 Mass. 155. The jury might not believe the testimony of Wyman. Or they could find that there was merely a promise or an offer of a promise voluntarily made by Wyman, but never accepted by the plaintiff, which never had become an agreement between them. The most that can be said is that it presented a question for the jury.

2. We are of opinion that upon all the evidence the question of Cole's authority to bind the defendants by making a contract in their behalf with the plaintiff was for the jury, although the evidence is meagre.

3. A real estate broker may entitle himself to recover a

commission by proof that it was he who, having been employed for that purpose, really brought about a sale or lease concluded by the owner of the property, that his efforts were the efficient cause of the sale or lease. Cases in which this was done, among others which might be cited, are *Desmond v. Stebbins*, 140 Mass. 339; *Gleason v. Nelson*, 162 Mass. 245; *Dowling v. Morrill*, 165 Mass. 491; *Hall v. Grace*, 179 Mass. 400; *French v. McKay*, 181 Mass. 485; *Willard v. Wright*, 203 Mass. 406. To recover upon this ground, it must be shown that an actual sale or lease was made. *Munroe v. Taylor*, 191 Mass. 483. The plaintiff does not seek to recover upon this basis.

A broker who is employed merely to procure a purchaser or tenant becomes entitled to a commission if he procures a customer who is able, ready and willing to take the property at the price and upon the terms fixed by the owner, and whom the owner accepts. *Taylor v. Schofield*, 191 Mass. 1. *Monk v. Parker*, 180 Mass. 246. *Fitzpatrick v. Gilson*, 176 Mass. 477. It does not affect the broker's right in such a case that the owner afterwards refuses to carry out the transaction. *Carnes v. Howard*, 180 Mass. 569. It is upon this ground that the plaintiff bases his claim.

On the evidence, we are of opinion that the jury might have found that the plaintiff, after the failure to accomplish anything in November, 1905, was employed to see Wyman and bring him to the defendants, and that if the defendants accepted Wyman as a tenant, they were to pay the plaintiff the ordinary broker's commission. It could have been found that the condition was not, as it was contended to be by the defendants, that they should execute a lease to Wyman, but merely that they should accept him as a tenant. This would entitle the plaintiff to recover if it should be shown that they had accepted Wyman as their tenant. There was evidence that they came to an agreement with him to accept him, and began to make out a lease to him, and that Wyman was ready to accept a lease and able to comply with its terms. But it appeared that then, upon objection being made by other tenants in the building to any part thereof being leased to Wyman, the defendants finally refused to let him into the building or to give any lease to him. The question is whether upon this evidence, taking the most favorable

view for the plaintiff, the jury would have had a right to find that the defendants had once accepted Wyman as their tenant, and that all the terms of the proposed tenancy had been agreed upon so that nothing was left to be done except to write out and execute the proposed lease. We are of opinion that the jury could so have found. In *Smith v. Kimball*, 193 Mass. 582, relied on by the defendants, the only agreement made by the defendant was to pay the plaintiff a commission if he procured a sale of the property; the plaintiff never did this; and the defendant never accepted a customer who was brought to him by the plaintiff.

Exceptions sustained.

GEORGE G. ADAMS vs. COUNTY OF ESSEX.

Middlesex. January 11, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

County Commissioners. Public Officers. Municipal Corporations, Officers and agents. Contract. Agency, Ratification. Essex County.

In employing an architect to draw plans for proposed county buildings or for proposed alterations in buildings already existing, county commissioners, although they are a local body whose duties relate principally to the affairs of the county, act as a board of statutory officers whose power to bind the county by contract depends upon the authority conferred by the Legislature.

Where the proper accommodation of the public demands that a county building should be improved and made more convenient by extensive alterations or that it should be enlarged by the erection of additions so that, when completed, substantially a new structure will be provided, it is the duty of the county commissioners before contracting for any expenditure to call the attention of the Legislature to the necessity and to ask for an appropriation; and if an appropriation is granted, the commissioners are limited, as to the amount which lawfully they can contract to expend, to the amount appropriated.

Whether county commissioners can contract for the county except by a majority vote at a meeting of the board, at which the members are present or of which they have received notice, and a record of which is kept according to R. L. c. 20, § 18, here was doubted but was not decided, a contract of the commissioners which was not so made being decided to be unauthorized for another reason.

Although by R. L. c. 20, § 27, county commissioners are permitted to make an oral contract without competitive bids when the amount involved does not exceed \$800, and by the second paragraph of § 24 they are empowered "to represent their county and to have . . . the management of its business and affairs in all cases not otherwise expressly provided for," such commissioners are not authorized to bind the county by contracts involving less than \$800, made with an

architect for the drawing of plans showing proposed alterations in a registry of deeds building, and of plans showing a separate boiler house for county buildings, where no special appropriation therefor has been made or authorized by the general court as provided by the first paragraph of § 24.

Where county commissioners have made a contract with an architect for the drawing of plans for a heating plant isolated from county buildings, which they did not have authority to make because no appropriation had been made or authorized by the General Court in accordance with R. L. c. 20, § 24, they are not given authority to ratify such contract by a subsequent special statute authorizing the erection and equipment of such heating plant, if such statute expressly delegates the authority to contract for plans to a special commission and not to the county commissioners.

It seems, that if county commissioners, who have been given authority by the General Court to take land and to prepare plans for the erection of a certain county building, and for that purpose have been given authority to expend a sum not exceeding \$50,000, after having procured the money and having placed it in the county treasury, without complying with the requirements of R. L. c. 20, § 27, as to giving notice for proposals in case of contracts for building, altering, furnishing or repairing public buildings which exceed \$800, employ a certain architect to draw plans for a building of the estimated cost of \$275,000 without stipulating any definite compensation therefor, and either the commissioners or the architect understand that the usual compensation for such plans would exceed \$800, and the architect prepares the plans and a reasonable compensation for the work is \$9,825, the architect cannot recover therefor from the county, because such a contract would be made in violation of R. L. c. 20, § 27, and therefore by the provisions of that section "no payment thereon shall be made by the county."

If by a statute of the General Court county commissioners are authorized to spend \$50,000 for the acquirement of land for a county building and for the preparation of plans for the building, and by a subsequent statute of the General Court an additional amount is authorized to be used for the acquirement of land for the same purpose, but no mention is made of plans in the later statute, any plans contracted for must be paid for out of the original \$50,000, and no part of the additional sum authorized by the subsequent statute can be so used.

At the trial of an action of contract a material question was whether or not certain payments, made by county commissioners out of funds which by a statute of the General Court they were authorized to use for the acquiring of land upon which a county building was to be built, were legal, and the county treasurer testified without contradiction that the sums so paid were included in accounts properly certified as having been allowed by the commissioners by an assistant clerk of courts, who by R. L. c. 165, § 3, was an assistant clerk of the board of county commissioners, and that the certificate was accompanied by deeds of conveyance of land for which the payments were made. The presiding judge was asked to rule as matter of law that the payments were illegal because they were not made, as required by R. L. c. 21, § 9, upon orders drawn and signed by a majority of the commissioners certified by their clerk and accompanied by the original bills, vouchers or evidences of county indebtedness for which the payment was ordered, stating in detail the items and confirming the bill or account. The ruling was refused. *Held*, that the ruling was refused rightly because from the testimony of the treasurer a finding would have been warranted that the provisions of the statute had been complied with.

County commissioners, who have been authorized by the General Court to acquire

land for the erection of a county building and to prepare suitable plans for such building, for which purposes they were to expend a sum not exceeding \$50,000, having procured the money and placed it in the county treasury, made a valid contract with an architect for the furnishing of plans for a building of the estimated cost of \$275,000, and the architect furnished such plans. The reasonable value of his services in doing so was \$9,625. Thereafter the architect was paid \$2,000 on account in two payments and the commissioners used up all but \$20.35 of the remainder of the \$50,000 appropriation in payments for land taken. The architect brought an action against the county for the balance alleged to be due him. The judge who presided at the trial ordered a verdict for the plaintiff for \$20.35. *Held*, that the action of the trial judge was correct, because, while the commissioners should have paid the plaintiff first and then sought an additional appropriation for the purpose of paying for land taken, their negligence in not doing so and in permitting the fund in their hands to be reduced so that the plaintiff could not be paid therefrom did not make the county liable, since in so doing the commissioners were acting as public officers and not as the county's agents.

CONTRACT. Writ dated January 23, 1907.

The declaration was upon an account annexed which in substance was as follows:

(1) July 3, 1905. For architectural services in drawing plans for proposed buildings for registry of deeds and probate court at Salem, . . . 3½% on an estimated cost of \$275,000	\$9,625.00
(2) June 1, 1904. For architectural services in drawing plans showing proposed alterations in registry of deeds building at Salem, . . . 1% on estimated cost of \$50,000	500.00
(3) June 1, 1905. For architectural services in drawing plans showing a separate boiler house at Salem	800.00
(4) For disbursements for sundry travelling expenses in connection with the drawing of said plans	87.53
Total	\$10,462.53
Credits	2,000.00
Balance due	\$8,462.53

The answer, besides containing a general denial and an allegation of payment, alleged "that if the plaintiff shall show that he was ever employed to render services, as set forth by him in his declaration, such employment, and all contracts or agreements

made by the county commissioners concerning the same, were entered into in violation of the provisions of statute concerning the same, and were not binding upon the defendant; and that the furnishing or drawing or procuring of any plans, either for alteration or for the erection of any building for the registry of deeds and Probate Court at Salem . . . were done under the provisions of St. 1902, c. 266, and that by said act the amount which the county commissioners were authorized to expend for the acquiring of land and preparing plans for a building for the registry of deeds for the southern district and for the probate court of said county was limited to the sum of \$50,000, and that all of said sum has been properly expended for the purposes as set forth in said act long prior to the bringing of the plaintiff's writ."

The case was tried before *Hardy, J.* The facts are stated in the opinion.

At the close of the evidence the plaintiff requested the following rulings:

1. The vote of the county commissioners of December 12, 1904, to employ the plaintiff to prepare plans under St. 1902, c. 266, and the performance of work by the plaintiff under said vote constituted a valid contract between the parties and, the contract being made and the liability of the defendant incurred at a time when there was sufficient money under appropriation to discharge said liability, the plaintiff is entitled to recover whatever the jury find to be the balance due under said contract with interest thereon.

2. All liabilities incurred by the defendant under St. 1902, c. 266, are entitled to be paid in the order in which said liabilities were incurred, and the defendant could not exhaust the appropriation under said act by the payment of liabilities incurred subsequent to that incurred with the plaintiff and thereby deprive him of the right to recover.

3. The payments of the liabilities incurred by the defendant subsequent to the contract with the plaintiff not having been made in conformity with the provisions of R. L. c. 21, § 9, were illegal, and the appropriation is not therefore legally exhausted.

4. The liability incurred by the defendant under its contract

with the plaintiff constituted a charge upon the fund appropriated under St. 1902, c. 266, and it was the duty of the commissioners to reserve sufficient moneys from that fund to discharge said liability when its amount should become determined and not exhaust the fund by paying liabilities subsequently incurred.

5. The plaintiff was chargeable with knowledge only of such payments or liabilities under the appropriation as were made or incurred before his contract and such as were then matters of record, and he was not bound to know of payments or liabilities subsequent to the date of his contract.

The presiding judge refused to rule as requested, ruled that the plaintiff was not entitled to recover on the second item of the account annexed to the declaration, and instructed the jury in regard to the third item that if they were satisfied that those services were rendered before May 19, 1905, then they had the right to consider the value of the services in connection with the other items in this case.

Questions then were submitted to the jury, which they answered as follows:

(1) What was the fair and reasonable value of the services rendered by the plaintiff for the defendant county, described in the declaration? To which the jury answered, \$9,962.53.

(2) Were the bills for such services presented for payment to the treasurer of the defendant county within a reasonable time after they were approved by the county commissioners? To which the jury answered, Yes.

(3) What was the amount unexpended of the appropriation of \$50,000 under St. 1902, c. 266, at the time of the last payment on account of such bills on April 8, 1905? To which the jury answered, \$20.35.

(4) What was the amount unexpended of the appropriation of \$12,000 and the proceeds of the sales of buildings and materials under St. 1905, c. 430, at the time of the presentation of the plaintiff's bills on May 23, 1906? To which the jury answered, \$2,041.50.

The presiding judge thereupon ordered the jury to find for the plaintiff in the sum of \$20.35, and, the plaintiff having excepted, reported the case for determination by this court, the

parties agreeing that, if on the facts found the rulings on questions of law and of fact, were correct, the verdict was to stand and judgment was to be entered on the verdict; but that otherwise a verdict was to be ordered on the findings of the jury in their answers to the first and the fourth questions.

The case was submitted on briefs.

J. P. Sweeney & L. S. Cox, for the plaintiff.

H. H. Newton & C. M. Cram, for the defendant.

BRALEY, J. The declaration is upon an account annexed of four items, but, the fourth having been waived, the other items are for services rendered by the plaintiff as an architect in preparing and furnishing plans for proposed county buildings and for proposed alterations in the building used for the registry of deeds. By their answer to the first question, the jury have determined that, exclusive of the second item, the total amount charged represents the fair and reasonable value of the services, and the questions for decision are, whether the defendant is responsible for the whole, or for any part of this sum, or for the amount of the second item.

In employing the plaintiff, the county commissioners, although a local body whose duties related principally to the affairs of the county, acted as a board of statutory officers whose power to bind the county by contract depended upon the authority conferred by the Legislature. *Morse v. Norfolk County*, 170 Mass. 555, 556. *Connors v. Stone*, 177 Mass. 424, 428. By the Rev. Sta. c. 14, § 31, county commissioners were empowered "to provide for the erecting and repairing of court houses, jails, and other necessary public buildings, within and for the use of the county." No restriction seems to have been placed upon the amount necessary to be expended, which was apparently left to the sound judgment of the board. But by § 32, in making the estimates of taxes for county charges to be laid annually before the General Court, they were required to include for the next ensuing year all charges and debts for the building and repairing of court houses and other county buildings. The Gen. Sts. c. 17, §§ 16 and 18, and Pub. Sts. c. 22, § 20, and c. 23, § 22, by re-enactment contained similar provisions. To check a growing tendency to extravagance, accompanied by other evils in the management of county affairs, St. 1897, c. 137, to further define

the powers and duties of county commissioners, was passed. The first section amended Pub. Sta. c. 22, § 20, by providing, "but no money shall be paid or liability incurred for erecting such buildings in excess of the amount specifically authorized by the General Court therefor, or, except in case of emergency, for the repairing of such buildings in excess of the amount authorized by the General Court for the repairs of county buildings." By this statute, which is now embodied in R. L. c. 20, § 24, where the proper accommodation of the public demands that a county building should be improved and made more convenient by extensive alterations, or enlarged by the erection of additions, so that when completed substantially a new structure has been provided, it is the duty of the commissioners before contracting for any expenditure to call the attention of the Legislature to the necessity and ask for an appropriation, which if granted they cannot lawfully exceed. *District Attorney v. County Commissioners*, 14 Gray, 138. *Morse v. Norfolk County*, 170 Mass. 555.

It is conceded that under the provisions of the special acts the commissioners had not been authorized to make over the old building occupied by the registry of deeds and of probate, or to build a boiler house, and to contract for the preparation of plans as a necessary part of the work. Sta. 1902, c. 266; 1905, cc. 423, 430; 1907, c. 151. The plaintiff rests his right of recovery upon the ground, that his employment was authorized under R. L. c. 20, § 27, permitting an oral contract without competitive bids where the amount involved does not exceed \$800, and that as § 24 also authorizes the commissioners "to represent their county, and to have . . . the management of its business and affairs in all cases not otherwise expressly provided for," the defendant is liable under the second item, because one of the incidental purposes, for which plans showing the proposed reconstruction were prepared, was for use at a legislative hearing in opposition to the building of a new court house, which in the judgment of the commissioners would impose an unnecessary expense upon the county. In each instance the plaintiff furnished the plans at the oral request of the commissioners, although afterwards upon presentation they indorsed the bills, as allowed. It may be questioned whether the commissioners

could contract for the county except by a majority vote at a meeting of the board of which the members had received notice or were present, and their action recorded as required by R. L. c. 20, § 18. *Reed v. Scituate*, 5 Allen, 120, 124. *Damon v. Selectmen of Framingham*, 195 Mass. 72, 78. But independently of this doubt, as it does not appear that any appropriation had been provided under § 24, with which § 27 must be read, they were not authorized to bind the county by either contract, and the ruling that the plaintiff could not recover on the second item was correct. *Connors v. Stone*, *ubi supra*.

In reaching the same result as to the third item, we have not overlooked the subsequent St. of 1906, c. 294, providing an additional grant for furnishing and equipping the new registry and probate building, and authorizing the erection and equipment of an isolated heating plant, which was however to be constructed subject to the provisions of the St. of 1905, c. 423. By § 2 of that act, authority to contract for plans having been expressly delegated to a special board, the county commissioners were deprived of any power to confirm their previous employment of the plaintiff.

We now come to the first item, over which the principal controversy arises. By St. of 1902, c. 266, § 1, the county commissioners were given authority to take land by purchase or otherwise as far as might be necessary, "for a new building for the use of the registry of deeds for the southern district of said county, and for the Probate Court of said county, and to prepare suitable plans for such building. For these purposes they may expend a sum not exceeding fifty thousand dollars." To meet the expenses to be incurred, § 4 authorized them from time to time to borrow this sum on the credit of the county, and the money was procured and placed in the treasury. At the time of its passage R. L. c. 20, § 27, was in force, providing that "all contracts . . . for building, altering, furnishing or repairing public buildings, or for the construction of public works . . . shall, if exceeding eight hundred dollars in amount, be made in writing, after notice for proposals therefor has been posted in a conspicuous place in the county court house for at least one week and has been published at least three times in a newspaper, if any, published in the city or town interested in the

work contracted for; otherwise in the newspaper of the most general circulation in the county." If this is not done, "no contract made in violation of the provisions of this section shall be valid against the county, and no payment thereon shall be made by the county." It is therefore manifest that the authority of the commissioners was limited and defined by these statutes, with notice of which the plaintiff was charged. *Edge Moor Bridge Works v. County of Bristol*, 170 Mass. 528, 533. *Boston Electric Co. v. Cambridge*, 163 Mass. 64. *Wormstead v. Lynn*, 184 Mass. 425. *Webb Granite & Construction Co. v. Worcester*, 187 Mass. 385, 387. *Revere Water Co. v. Winthrop*, 192 Mass. 455. *Bartlett v. Lowell*, 201 Mass. 151. *Friedman v. County of Hampden*, 204 Mass. 494.

Without having advertised for proposals, the board at a regular meeting held on December 12, 1904, unanimously voted to employ the plaintiff as an architect, "to prepare plans for a building in Salem under St. 1902, c. 266," but no definite compensation was named, nor was any contract in writing prepared and signed. The plans, although furnished in consequence of the vote, were never used, as they were not accepted by the supervisory commission subsequently created by the St. of 1905, c. 423, § 2, to whom alone plans were to be submitted, and approved. At that time no appropriation for the building had been made, although subsequently by St. of 1905, c. 423, it was provided.

If the agreement with the plaintiff shown by the recorded vote, and his acceptance, were a contract, the consideration of which was the fair and reasonable value of his services, one of the purposes of § 27 is to prevent in any form contracts exceeding the limitation, unless the other requirements are strictly followed. It would nullify not only the letter, but the spirit of the law, to hold that the county had been bound, where the commissioners and the plaintiff must have understood that by the usual standard of compensation, which is a percentage based upon the estimated cost of the building, the amount involved would exceed the limit. It would be difficult to assume that the commissioners acted ignorantly, yet if they disregarded the requirements of § 27, the plaintiff must have known that his services would exceed the amount. *Wormstead v. Lynn*, *ubi supra*. See *Cutter v. County of Middlesex*, 189 Mass. 451, 456. But

while this question has been argued at length in the defendant's brief, and necessarily calls for discussion, it does not appear that this defense, which would have been decisive, was passed upon at the trial, or, if presented, is not reserved by the terms of the report.

But if the contract is held to be valid and binding on the county, we find no error of law. The plaintiff admits that the commissioners could not exceed the amount provided by St. of 1902, c. 266. By this act suitable plans were specifically named, and although the St. of 1905, c. 430, granted an additional appropriation, which might be augmented by money received from the sale of buildings or parts of buildings and material on the land acquired for the site of the court house, no reference to plans is found, and no part of the increase over the original sum could be used for this purpose. R. L. c. 20, § 24. *Connors v. Stone, ubi supra. Boston Electric Co. v. Cambridge, ubi supra.* If the consideration of the contract was unliquidated, there is no question that at the time of the vote the specific amount in the treasury, not having been drawn upon except for a small disbursement, or anticipated by previous contracts, was more than enough to pay for the plaintiff's services. It was plainly the duty of the commissioners not to incur subsequent indebtedness to such an amount as to exhaust it, without leaving a sufficient balance, or if, after payment for the plans, the appropriation was deemed insufficient because it probably would be exceeded in paying for the land, to apply to the Legislature to grant an additional amount sufficiently ample to provide for the deficiency. *District Attorney v. County Commissioners, ubi supra.* The plaintiff, however, as we have said, must be presumed to have known of the limitation, and the purposes for which the money had been provided, and he also must have been aware that until the land was bought the court house could not be erected or his plans used, and to have contracted accordingly. It would abrogate the provisions of R. L. c. 20, § 24, if the commissioners, while expending the money for the purposes specified, could exceed the sum named, and it is apparent that the deficit arises from subsequent payments for the land.

But the plaintiff's argument cannot be sustained, that the payments were illegal because not made by the county treasurer

in conformity with R. L. c. 21, § 9, which provides that "no payments . . . shall be made by a treasurer except upon orders drawn and signed by a majority of the county commissioners, certified by their clerk and accompanied . . . by the original bills, vouchers or evidences of county indebtedness for which payment is ordered, stating in detail the items and confirming such bill or account. Said clerk shall not certify such orders until he has recorded them in the records of the county commissioners." The treasurer testified without contradiction, that the sums so paid were included in the accounts properly certified by the assistant clerk of courts as having been allowed by the commissioners, and the various deeds of conveyance running to the county which he also received properly may be deemed "vouchers or evidences of county indebtedness," within the obvious meaning of the statute.

By these payments the appropriation was exhausted, with the exception of a very small balance.

If the appropriation, as the plaintiff contends, is considered as a fund, which until the limit was reached should have been apportioned by priority between him and those from whom the land was obtained, in the order of purchase, until it was exhausted, the commissioners were not acting as the defendant's agents, and their negligence in permitting the fund to be thus reduced does not enable the plaintiff to hold the county for a sum sufficient to satisfy the remainder of his demand. *Morse v. Norfolk County, Wormstead v. Lynn, Connors v. Stone, ubi supra. McManus v. Weston*, 164 Mass. 263. It is the plaintiff's misfortune, that, after crediting the payments received, his recovery can be for only the nominal sum remaining unexpended of the original appropriation, but, from what we have said, his requests for rulings were rightly refused, and, by the agreement of the parties stated in the report, the entry must be, judgment on the verdict.

So ordered.

ANNA T. O'DONNELL vs. BOSTON ELEVATED RAILWAY
COMPANY.

ROSE E. FORD vs. SAME.

ANDREW D. W. REID vs. SAME.

Suffolk. January 11, 1910. — February 24, 1910.

Present : KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, In use of electricity, *Res ipsa loquitur*. *Evidence*, Presumptions and burden of proof. *Electricity*.

At the trial of an action against a corporation operating an elevated railway by the use of electricity, for personal injuries received by the plaintiff, while travelling upon Shawmut Avenue in Boston, from an explosion in a manhole at the southeast corner of Shawmut Avenue and Pleasant Street through which ran several of the cables used by the defendant for the transmission of electricity, it appeared that the manhole and the cables were in the exclusive charge and control of the defendant. The evidence of the plaintiff tended to show that on previous occasions gas had leaked into the manhole, that for about two hours before the explosion a little smoke had been seen coming out of a subway very near the manhole, into which the cables from the manhole ran and where the defendant's cars ran, and that about fifteen minutes before the explosion smoke was seen coming out of the manhole, that not long before the explosion there had been a fire in the subway at a point about two hundred feet south of Boylston Street, caused by the short circuiting of a large cable there, which had set fire to a wooden box through which it ran and which had affected two or three of the cables which ran into the manhole where the explosion occurred, partly melting off their insulation, although the part of the cables that was in the manhole was intact, and that there was an automatic circuit breaker at the defendant's power station, the opening of which would have shut the power off from a wire. The chief of the city fire department testified that, when he entered the subway at the time of the fire therein, there was still some electric current in the cables, but that subsequently it was shut off so that he could make an examination. The defendant offered no evidence. *Held*, that there was evidence from which, in the absence of any explanation of the explosion by the defendant, whose officers and men had the best means of knowledge on the question, a finding that the explosion was due to negligence of the defendant or its servants or agents was warranted.

Electricity being a highly dangerous element, one employing it for his own purposes is held to a correspondingly high degree of care in its use.

THREE ACTIONS OF TORT by travellers upon Shawmut Avenue in Boston, who were injured by an explosion in a manhole of the defendant at the southeast corner of Pleasant Street and Shawmut Avenue. Writs dated, two on July 2 and one on July 9, 1906.

The cases were tried together before *Fessenden, J.* The facts are stated in the opinion.

The defendant offered no evidence. At the conclusion of the plaintiffs' evidence, the defendant asked for a ruling that there was not sufficient evidence of negligence on the part of the defendant to warrant verdicts for the plaintiffs. After conference with counsel, the presiding judge submitted the cases to the jury, counsel for all parties agreeing that if the jury should return verdicts for the plaintiffs, such verdicts should be set aside and verdicts should be ordered for the defendant, and that the cases should be reported to this court with the stipulation that, if there was sufficient evidence of negligence on the part of the defendant to warrant verdicts for the plaintiffs, judgment should be entered in the amounts found by the jury; otherwise, that judgments should be entered on the verdicts for the defendant. Accordingly the cases were submitted to the jury, who found verdicts for the several plaintiffs and assessed damages for the plaintiff O'Donnell in the sum of \$2,000, for the plaintiff Ford in the sum of \$350 and for the plaintiff Reid in the sum of \$10, which last sum was by agreement increased to \$30. These verdicts were set aside and verdicts for the defendant were ordered and the cases were reported in accordance with the agreement.

J. M. Graham, for the plaintiffs.

F. Ranney, for the defendant.

SHELDON, J. The only question upon the report in these cases is whether there was sufficient evidence of negligence on the part of the defendant to warrant verdicts against it. There was evidence that the manhole in which the explosion occurred was the defendant's and that the cables which ran through the manhole were the defendant's cables. They constituted a part of the appliances by which power was carried to the defendant's lines to be used for the propulsion of its cars. They were in the exclusive charge and control of the defendant. There was evidence that for about two hours before the explosion a little smoke had been seen coming out of the defendant's subway very near to this manhole, and out of the manhole itself about fifteen minutes before the explosion. There was evidence that gas had leaked into this manhole on previous occasions. There was also

evidence that not long before the explosion there had been a fire in the subway about two hundred feet south of Boylston Street in the direction of this manhole, caused by the short circuiting of a large cable there, which had set on fire a wooden box through which it ran. The fire, according to the evidence, had also affected two or three cables which ran through this manhole, partly melting off from them their lead covering and the insulation which was on them, although the cables in the manhole itself were intact and not burned there or in that locality. There was an automatic circuit breaker at the defendant's power station, the opening of which made the wire "dead," or shut off the power. Madison, the acting chief of the fire department who went to the fire in the subway, testified that there was some current on in the subway, but that it was subsequently taken off so that he could make an examination there.

Meagre as this evidence was, we are of opinion that the jury might have inferred from it that the explosion was due to electric sparks communicated to inflammable and explosive gas in the manhole, and that these sparks came from or were brought by the cables that passed through the manhole. It is difficult to see what other cause could have produced the explosion. And in our opinion the jury might also have found that the bringing or emission of these sparks was due to the effect upon the cables of the fire in the subway a few hundred feet to the north of the manhole. Those cables, it could be found, had been seriously affected by the fire; no other change than that produced by the fire, so far as the evidence discloses, had been made in or about the cables. No other cause was suggested for the explosion; the defendant, whose officers and men had the best means of knowledge on the question, offered no explanation and put in no evidence. The fact that power had been promptly shut off from the subway when the firemen needed that to be done, would indicate, even without the testimony of Dey, that it also might have been shut off from the cables in this manhole, which were so seriously affected by the fire in its vicinity. We all know that electricity is a highly dangerous servant, and the defendant employing that dangerous servant for its own purposes is properly held to a correspondingly high degree of care in its use. But there is no evidence of any precaution taken by the defend-

ant to guard against danger which might have been created by the injury to these cables, just as there is no evidence that in fact danger was not to be apprehended in this manhole or elsewhere in the course of those cables by reason of such injury. From these circumstances the inference of negligence on the part of the company could have been drawn. If it is suggested that it may have been illuminating gas which exploded in this manhole, the answer is that this is only conjecture; and even so, just as, on Dey's testimony, the presence here of gas on previous occasions had been harmless, so the jury could find that it would have been on this occasion but for its ignition by reason of the defendant's negligence.

Again, the jury might have found that the short circuiting of the large cable which caused the fire in the subway was due to the defendant's negligence, and that the fire, by the injury which it did to the cables that passed through this manhole, was the cause of the explosion.

In each case judgment must be entered for the plaintiffs for the respective sums stated in the report.

So ordered.

XENOPHION GOODNOUGH vs. JOHN F. KINNEY.

Suffolk. January 12, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Agency. Broker, Commission, Double employment. *Evidence,* Presumptions and burden of proof. *Agency.*

Where an owner of real estate employs a broker to procure for him a purchaser on certain terms, and the broker secures a customer who is both willing and able financially to purchase the property on such terms, and the principal is informed of that fact, the broker's commission is earned, even if a sale never is completed either because the parties never enter into a binding agreement or because the owner refuses or neglects to make a conveyance.

At the trial before a judge without a jury of an action for a commission alleged to have been earned by the plaintiff in acting as broker in procuring a purchaser for real estate of the defendant, although an attorney at law, who had been employed in the transaction by a purchaser whom the plaintiff had testified that he had procured, remarks in testifying that he informed the defendant that the plaintiff was the broker for his client, the judge need not find that the plaintiff

was employed by both parties and therefore could recover commission from neither, especially where there is much other evidence tending to show that the plaintiff was not employed by the purchaser.

CONTRACT for a commission of \$35 alleged to be due for services as real estate broker rendered to the defendant. Writ in the Municipal Court of the City of Boston, dated August 18, 1908.

On appeal to the Superior Court, the case was heard by *Lawton, J.*, without a jury. The facts are stated in the opinion.

At the close of the evidence, the defendant asked for a ruling that on the evidence the plaintiff could not recover. The judge refused so to rule and found for the plaintiff; and the defendant alleged exceptions.

J. H. Kenney, for the defendant.

O. E. Kaine, for the plaintiff.

BRALEY, J. It is settled, that where the broker secures a customer who is both willing and financially able to purchase property upon the terms authorized by the principal, who has been informed of the completion of the negotiations, a commission has been earned, even if a sale is not completed because the parties never enter into a binding agreement or the owner refuses or neglects to make a conveyance. *Fitzpatrick v. Gilson*, 176 Mass. 477, 478. *Williard v. Wright*, 203 Mass. 406. *Cohen v. Ames*, ante, 186.

The defendant's first ground of defense is that, without disclosing to him the double employment, the plaintiff also acted as the agent of the proposed purchaser and therefore he cannot recover compensation from either. *Quinn v. Burton*, 195 Mass. 277. *Sullivan v. Tufts*, 203 Mass. 155, 158. But the only evidence upon which this contention can rest is the remark of counsel for the purchaser, who testified as a witness, that he informed the defendant that the plaintiff was the broker for his client. If by this remark anything more was meant than that the purchaser's attention had been called to the property by the plaintiff, the testimony of the other witnesses amply warranted a finding, negating any double employment.

It is next urged that the terms fixed by the sale were not in accordance with the defendant's instructions. But if it be assumed that the sale was to be for cash, the judge upon the evi-

dence could find it had been negotiated on this basis, and that there was a valid tender of performance by the purchaser which the defendant refused.*

The defendant's request for a ruling, that upon all the evidence the plaintiff could not recover was properly refused.

Exceptions overruled.

JOHN MORRIN vs. CHARLES F. MANNING.

Middlesex. January 12, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Trespass, Ab initio. Trover. Conversion. Evidence, Memorandum. Witness, Cross-examination. Practice, Civil, Conduct of trial, Requests and rulings, Verdict.

At the trial of an action of tort with a declaration containing three counts, the first for the conversion of the furniture and provisions in a restaurant, the second for the conversion of "divers bank notes and coins to the value of \$35," and the third for trespass in wrongfully excluding the plaintiff from his restaurant, there was evidence tending to show that the defendant, who was a constable, entered the plaintiff's restaurant to make an attachment under a writ and placed a keeper in charge, and that then, the plaintiff desiring to continue the business, it was arranged that the business should not be interrupted, but that the money taken in should be paid to the defendant; that, when the usual time for closing the store at night arrived, the defendant told the plaintiff that he would have to lock up the store himself unless the plaintiff was willing to surrender to him possession thereof and to give to him the keys; that the plaintiff thereupon gave the keys to the defendant; that at the usual opening time the next morning the defendant opened the store and left his keeper in charge; that during the day, because the defendant insisted that the waitresses pay to him money which they received, they all departed and the restaurant was left in the sole charge of the defendant; that at closing time the defendant, still retaining possession of the plaintiff's keys, against the objection of the plaintiff fastened the door with a padlock and staple and put a sign upon it, saying, "Closed. M., constable"; that the premises remained in that condition until, five days later, the plaintiff gave a bond dissolving the attachment, whereupon the defendant returned to the plaintiff the keys of the store, but did not return

* There was evidence that the defendant had asked the plaintiff to procure a purchaser for \$1,400, but that "there were no other terms made as to how the property should be sold"; that the plaintiff procured a customer who was willing and offered to pay cash to the defendant, but that the defendant, after failing to keep appointments with an attorney at law employed by the customer, finally said that he had been advised not to sell.

§27 which he had taken possession of. *Held*, that upon the evidence the jury properly might have found that the plaintiff surrendered the premises to the defendant only upon condition that the restaurant should be kept open during business hours, and therefore that the defendant properly might have been found to have been a trespasser *ab initio* and to be liable under all of the counts of the declaration.

An action of tort in the nature of trover will lie for the conversion of money.

A request for a ruling properly may be refused by the judge presiding at a trial if it singles out only one of several circumstances bearing upon a certain issue and asks for a ruling as to its effect apart from the other circumstances in evidence on the same issue.

At the trial of an action of tort where evidence as to the nature and extent of the plaintiff's business was admissible as bearing upon the question of damages that might be recovered for the alleged tort of the defendant, the plaintiff produced no books of account, but testified as to his business from certain memoranda in pencil, which he had drawn up on the morning of the trial with the assistance of his counsel. The counsel for the defendant took from the plaintiff the memoranda and cross-examined him with regard to them. On redirect examination of the plaintiff, the plaintiff's counsel offered the memoranda in evidence and they were admitted subject to an exception by the defendant. *Held*, that it could not be said that the presiding judge acted improperly, since he might well have thought that the memoranda would help the jury to understand the cross-examination better.

The declaration in an action of tort contained three counts, one for the conversion of the furniture and provisions in a restaurant, the second for the conversion of "divers bank notes and coins to the value of \$35," and the third for trespass in wrongfully excluding the plaintiff from the restaurant. At the trial it appeared that the money described in the second count was in the restaurant and that it and the furniture and provisions described in the first count were seized by the defendant under circumstances which could have been found to have made him liable as a trespasser *ab initio*, so that there was evidence which warranted a verdict for the plaintiff on each of the counts. The presiding judge was not asked to instruct the jury to find a verdict as to each count and did not do so. The jury returned a general verdict for the plaintiff. The defendant moved for a new trial on the ground that the jury should have been ordered to find separately as to each count. The motion was overruled. *Held*, that the motion properly was overruled, because, if the defendant wished that separate verdicts should be returned, he should have asked for an instruction to that effect, and also because as respected the question of damages the three counts of the declaration were closely connected with each other and described acts substantially forming parts of one transaction, so that the presiding judge well might have thought that it was best that damages should be assessed in one general sum.

TORT, with a declaration in three counts, the first count being for the conversion of "divers articles of restaurant furniture and property contained in the plaintiff's restaurant," the second for the conversion of "divers bank notes and coins to the value of thirty-five dollars, current as money in this Commonwealth"; and the third alleging that the defendant took possession of the plaintiff's restaurant, "seized all the furnishings, food and per-

sonal property therein, and continued to hold them in his possession for several days, and afterwards put out the plaintiff, his servants and agents, put a lock and staple on the door and locked up the door and restaurant, thereby depriving the plaintiff of the access, use, occupation and enjoyment of the premises and of the property therein contained." Writ dated October 15, 1907.

The case was tried before *Hitchcock, J.*

It appeared that the plaintiff kept a small restaurant at No. 6 Brattle Street in Cambridge, and that the defendant was a constable of that city, and that on October 6, 1907, in his official capacity as constable the defendant made an attachment of the plaintiff's goods in the restaurant on a writ against the plaintiff and returnable to the Third District Court of Eastern Middlesex; that at about noontime on the day of the attachment the defendant, "as appears by his return upon said writ, attached certain property of the plaintiff, and placed a keeper over the same; that the said property consisted of about a dozen small tables, seating three or four people each, a few dozen chairs, a cash register, seven dollars and twenty-one cents in money, and some food in the kitchen." The defendant testified that the plaintiff desired to continue with the business, that the business was continued, and that the money derived therefrom was paid to the defendant; that the plaintiff desired money to pay for certain incidentals and that the defendant, with the consent of the attorney for the plaintiff in the writ under which the attachment was made and at the request of the plaintiff in this action, paid these sums out of the money taken in.

The keeper remained until closing time, between seven and eight o'clock in the evening. Before the store closed, the defendant called at the store and remained until it was closed. At closing time the defendant told the plaintiff that he would be obliged to retain possession of the goods attached and would have to lock up the store himself unless the plaintiff was willing to surrender possession of the store and give him the keys. The keys of the store were thereupon given by the plaintiff to the defendant, the defendant locked up the store and then asked the plaintiff at what hour he opened in the morning. The plaintiff replied at six o'clock. It appeared that the defendant was at the plaintiff's store before six o'clock in the morning and opened it in order for

the plaintiff to go in and that the defendant kept possession of the keys and waited there until the keeper arrived, sometime about eight o'clock in the morning. The restaurant was usually kept open from six o'clock in the morning until eight o'clock at night.

After the arrival of the keeper on October 2, the defendant went away from the store, and returned about six o'clock in the evening. When he arrived there, the plaintiff being absent, he was informed by the keeper that the waitresses were not turning over to the keeper the money which they collected from the customers. The defendant testified without contradiction that when he arrived at the store, the plaintiff was not present, and upon receiving information from his keeper in reference to the conduct of the two waitresses, the only persons employed in the store, and the only persons who were there at the time except the keeper, he informed them that it would be necessary for them to turn over the money to the keeper; that the waitresses thereupon asked him who was going to pay them for their services; that he replied that he was not going to pay them and he supposed that they must look for their money to the plaintiff; that thereupon the waitresses refused to work longer and put on their hats and coats and left the store; that at that time there was but one customer in the restaurant who was just finishing his meal and that when he had finished the defendant locked up the store after having waited a reasonable time for the plaintiff to return. It further appeared that the defendant procured a padlock and staples and placed them upon the entrance door and kept the possession of the key of the padlock, together with the other keys which had been given to him by the plaintiff. He further placed a card upon the door, which had upon it, "Closed. Charles F. Manning, Constable of the City of Cambridge." The time of the closing of the store was between half-past six and seven o'clock. Just when the defendant had finished closing the store, as above described, the plaintiff and his attorney arrived. The plaintiff said nothing, but the plaintiff's attorney said that the defendant had no right to close up the place and that he was going to sue him for \$3,000.

It further appeared that the next day the plaintiff had a conversation with his landlord and explained to him that he, the plaintiff, no longer had possession of the store; that the defend-

ant had the keys of it and had placed a padlock upon the door; that on the same day the defendant received a letter from the landlord, stating that he had determined to hold the defendant responsible for the rent of the store from October 2, 1907.

On October 7, 1907, the plaintiff gave a bond to dissolve the attachment which had been made by the defendant, and the defendant forthwith returned the keys of the store and certain food checks to the plaintiff, but returned no money. The defendant admitted that he owed to the plaintiff \$24.37, but contended that the plaintiff could not recover it in this form of action.

The plaintiff produced no books of account, but had certain memoranda in pencil, which it appeared had been drawn up on the morning of the trial from other daily memoranda with the assistance of his attorney. The counsel for the defendant took from the plaintiff the memoranda and cross-examined him in reference to them. On redirect examination, the plaintiff offered the memoranda in evidence, and against the objection and exception of defendant they were admitted. The substance of the memoranda consisted of the calculations of the plaintiff in regard to the assessment of damages.

At the close of the evidence the defendant made several requests for rulings. The first three were for rulings as to each count that upon all the evidence the plaintiff could not recover thereon. The second set of rulings requested was as follows:

"1. If the jury find that the plaintiff gave to the defendant the keys of the store, they are warranted in finding that the possession of the store was given to the defendant by the plaintiff.

"2. If the jury find that fact as stated in request No. 1, then the defendant was justified in keeping the goods in the store and locking it up at least until notified by the plaintiff's landlord to remove them."

"4. If the jury find that the plaintiff surrendered the possession of the store to the defendant and that the plaintiff's landlord assented to it and looked to the defendant for rent, that is a surrender of the premises into the possession of the defendant by operation of law.

"5. If the jury find there was a surrender of the premises by

operation of law, then the defendant was justified in locking it up and holding the attached goods there as a place of storage.

"6. There is no evidence warranting a finding that the defendant unlawfully excluded the plaintiff from access to the store."

"10. Under the pleadings the plaintiff is not entitled to recover for annoyance, inconvenience, and loss of business and reputation, if any he suffered.

"11. Under the pleadings the only damage that the plaintiff is entitled to recover, if any, is such damage as is allowed in an action for conversion."

The rulings asked for were refused. The jury found for the plaintiff in the sum of \$1,000; and the defendant alleged exceptions.

Other facts are stated in the opinion.

F. J. Carney, for the defendant.

J. L. Sheehan, (*J. S. Cannon* with him,) for the plaintiff.

HAMMOND, J. 1. Upon the evidence the jury might properly have found that, even if the plaintiff had consented that the defendant should have the keys of the restaurant in his possession for the preservation of the attachment, he consented only upon the condition that the restaurant should be open for business at its usual hours; that the defendant, in view of the failure of the waitresses to pass over to him the money received by them from the customers and of the other circumstances in the case, had concluded to stop the business and entirely exclude the plaintiff from the restaurant, even during business hours; that in execution of that purpose he procured a padlock and some staples and with them locked the entrance door, and further posted upon the door the notice that the place was closed by him as constable; and that in this way the plaintiff was excluded from the restaurant for several days against his own will. The jury were instructed in substance that the plaintiff could not recover if he consented to being excluded. Their verdict shows that they found he was excluded from the store without his consent. In thus excluding the plaintiff the defendant exceeded his authority under the writ and became a trespasser *ab initio*. *Walsh v. Brown*, 194 Mass. 317.

2. Being without justification for the seizure of the articles of

personal property he was liable in conversion for the property he seized. It is urged, however, by the defendant that even if trover will lie for the conversion of the personal property named in the first count, it will not lie for the conversion of the money in the second count; that the taking and keeping of the money by the defendant under the circumstances created only a general indebtedness from him to the plaintiff, and that trover will not lie for a general indebtedness.

The return made by the defendant is not set out in full in the record before us, but it is stated that it appears from the return that after deducting from the money which the defendant received the money which he had paid out there was left in his hands \$24.37. It is to be assumed that he originally took the money by attachment under his writ. Having by subsequent misconduct become a trespasser *ab initio*, he no longer had any right to its possession. It is as if he had wrongfully taken it in the first place to his own use. It is elementary that for the conversion of money, either in the form of specie or notes, trover will lie.

So far as respects the third count, which was in trespass, suffice it to say that the evidence was ample to support it.

The first three requests therefore were rightly refused. As to the second set of requests, the first and second were rightly refused because they single out only one of several circumstances bearing upon the same issue and ask for its effect when considered apart from the others; the fourth and fifth were covered, so far as sound in law, by the instruction given to the effect that if the plaintiff consented to being excluded from the store he could not recover; the sixth was rightly refused because inconsistent with a legitimate view of the evidence, and the same may be said of the tenth and eleventh.

3. The memoranda produced by the plaintiff and taken by the defendant, and with reference to which the defendant cross-examined the plaintiff, were properly admitted in evidence. Even if the rule making a paper admissible, which is called for by one party, is produced by the other and is examined by the party calling for it, is not applicable, there is still a reason for the admission of the memoranda in this case. In a certain sense they were a part of the cross-examination, and the presiding

judge may well have thought that they should be admitted not as evidence of the truthfulness of the statements therein contained, but in order to the full understanding of the cross-examination. The record shows no error in its admission.

4. The jury returned a general verdict for the plaintiff in the sum of \$1,000, whereupon the defendant moved to set aside the verdict for the three following reasons (among others):

"3. While three separate and different counts for different causes of action were submitted to the jury, a general verdict in favor of the plaintiff was found and it should therefore be set aside.

"4. The measure for damages under the different counts and different causes of action submitted to the jury was not the same and the general verdict in favor of plaintiff should therefore be set aside.

"5. The defendant was prejudiced by the finding of a general verdict in favor of plaintiff because different counts for different causes of action in which the measure of damages was not the same, were submitted to the jury, and it should therefore be set aside."

Where there are two or more counts each for a different cause of action, it is the right of either party to have a separate verdict on each count, and such a course often is taken. But it is a right which may be waived, and it is not unusual to have a general verdict on all the counts. *Wood v. Southwick*, 97 Mass. 354. And in the absence of any request to the contrary such a verdict, at least where there is evidence to sustain each count, is good. *Richmond v. Whittlesey*, 2 Allen, 230.

In *Richmond v. Whittlesey*, *ubi supra*, there were four counts, the first and second being for assault and battery and false imprisonment, the third for the conversion of a horse and the fourth for slander. The jury were instructed that the plaintiff was not entitled to recover on the fourth count. There was a general verdict for the plaintiff, and the defendants moved in arrest of judgment, one of the grounds alleged being that "the verdict is a general verdict on four counts, and it does not appear on which counts the jury found for the plaintiff, or how damages were assessed by them on the several counts." The motion was overruled and on the exception of the defendant the case came to

this court. In giving the opinion of the court Bigelow, C. J., used the following language: "The motion in arrest of judgment cannot prevail. The several counts in the declaration, except the fourth, were properly joined under Gen. Sts. c. 129, § 2, cl. 5, and the jury were correctly and distinctly instructed by the court that the plaintiff was not entitled to recover on the fourth count. It must now be assumed that under this explicit instruction no damages were given for the alleged slander set out in the fourth count. The verdict was therefore a general verdict in damages on three counts, which were valid and sufficient and properly joined, and in support of which there was evidence laid before the jury. The assessment of entire damages on all the counts constitutes no error. If the defendant wished that the damages on each count should be assessed and returned separately, he should have requested the court to instruct the jury to return their verdict accordingly. Having failed to do so, he cannot now take the objection that the verdict was general and does not show the damages which were assessed on each cause of action set out in the declaration. 1 Chit. Pl. (6th Am. ed.) 445."

The principle thus set forth is decisive of this case. Moreover in the case before us it is to be noted that while there were three counts, yet so far as respects the question of damages they were closely connected with each other and described acts substantially forming parts of one and the same general transaction; and the trial judge may well have thought that the most sensible way was for the jury to assess the damages in one general sum, and that the parties were content with that method.

Exceptions overruled.

ROBERT HOE & another *vs.* REX MANUFACTURING COMPANY
& another.

UNITED CORK AND SEAL COMPANY *vs.* ROBERT HOE
& another.

Norfolk. January 17, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Sale, Conditional Contract, Performance and breach, Validity.

The owner of certain chattels made with one desiring to purchase them an agreement in writing whereby the chattels were to be delivered to the prospective purchaser, the title remaining in the vendor "until the same shall have been fully paid for," the vendee to have the use of them meanwhile and to care for them and keep them in repair, to give to the vendor access to them at any time for purposes of inspection and repair but not to permit any one else to use them, to keep them insured for the vendor's benefit, and to pay a certain sum down and certain other sums making up the balance of the purchase price with interest in quarterly instalments. It also was provided that the vendee should give certain notes corresponding in amount and times of payment and rate of interest to the quarterly payments to be made by him, "as collateral to the payment for said chattels," and that "on the payment of any one of the said notes the instalment corresponding thereto shall be deemed paid, and the said "vendor is "at liberty to dispose of any or all of said notes before or after maturity." On full performance of the agreement, the title to the chattels was to vest in the vendee, but "on failure" by the vendee "to keep the terms" of the agreement, the vendee was to give the vendor access to the chattels and to make no opposition to a removal of them. After having failed to pay several of the instalments, the vendee assigned his rights under the agreement to one who knew of its terms and to whom, through a third person, he also conveyed and gave possession of the premises where the chattels were. The vendor, while still retaining possession of the vendee's notes, replevied the chattels, and the vendee's assignee brought an action of tort or contract against the vendor, contending that the taking was wrongful. *Held*, that the agreement could not be said to be in violation of morality or against public policy, that, the notes being given "as collateral," the vendor did not have to deliver them up or rescind the contract before taking possession of the chattels, and that the taking, having been made after the vendee had broken the terms of the contract, was lawful.

REPLEVIN of certain chattels alleged to be detained by the Rex Manufacturing Company and Edward J. Stewart. Writ dated November 4, 1907; also

TORT OR CONTRACT, with a declaration in six counts, alleging that the taking of the chattels in the replevin suit was unlawful, and seeking damages. Writ dated August 15, 1908.

The two cases were heard together by *Crosby, J.*, without a jury. The following facts were agreed upon:

The plaintiffs in the action of replevin and the Rex Manufacturing Company, on July 19, 1906, made an agreement in writing substantially as follows:

“Whereas, the said Rex Manufacturing Company is desirous of purchasing from the said R. Hoe & Co. the following described chattels [here followed a schedule which included the chattels replevied] . . . and the said R. Hoe & Co. on their part, are desirous of selling the said chattels to the said Rex Manufacturing Company; and

“Whereas the parties hereto desire that the title to the said chattels shall remain vested in the said R. Hoe & Co., until the same shall have been fully paid for, and that the said Rex Manufacturing Company, while paying the consideration hereinafter specified and complying with and keeping terms of this agreement, use said chattels in the usual course of its business, at its present place of business in . . . Boston. . . .

“Now, therefore, the said Rex Manufacturing Company agrees with R. Hoe & Co. to purchase the said chattels of them and to pay therefor the sum of \$4,338.00 as follows: [here follow stipulations for a certain payment down and quarterly payments of principal and interest thereafter]. . . .

“The said Rex Manufacturing Company further agrees with R. Hoe & Co. to pay all taxes which may be levied or assessed on or on account of said chattels while this agreement is in force, and to keep the same in good order, reasonable wear and tear excepted, and to allow the said R. Hoe & Co., their servants and agents, free access thereto to inspect the condition thereof, and for the purpose of putting and keeping the same in good order, and to pay all reasonable expenses and charges therefor and for all materials, machines and parts furnished by the said R. Hoe & Co., to be used in connection with said chattels; and to pay all sums that said R. Hoe & Co. shall expend in taking out policies of insurance on said chattels, in such companies, of such form and in such amount as shall be satisfactory to the said R. Hoe & Co.; and agrees not to remove said chattels from its present place of business without the written consent of said R. Hoe & Co. except in case of fire or other calamity, and agrees,

on failure to keep the terms hereof, to afford to the said R. Hoe & Co., and their servants and agents, access to the said chattels for the purpose of removing the same, and not to oppose such taking or removal, or to make any claim for tort or trespass arising therefrom or connected therewith, and to protect the said R. Hoe & Co., their servants and agents, from all injury, damage or loss by or by reason of said chattels, reasonable wear and tear excepted, happening while this agreement is in force, except as so far as they are compensated by insurance.

“In the event of loss or damage by fire, the said R. Hoe & Co. will pay to the said Rex Manufacturing Company any balance from sums collected on insurance policies, after deducting all sums owing by the said Rex Manufacturing Company to the said R. Hoe & Co., whether then due or not, together with the expenses of the collection of the same.

“As collateral to the payment for said chattels, the said Rex Manufacturing Company herewith deliver to the said R. Hoe & Co. their six certain promissory notes, [corresponding in amounts, dates when due and rate of interest to the quarterly payments to be made by the vendee] . . . payable to the order of R. Hoe & Co.; on the payment of any one of the said notes the instalment corresponding thereto shall be deemed paid, and said R. Hoe & Co. are at liberty to dispose of any or all of said notes before or after maturity. The said R. Hoe & Co. acknowledge the receipt of said notes as collateral, and grant to the said Rex Manufacturing Company, while keeping the terms of this agreement, the right to use the said chattels; and agree that upon the full performance of all of the terms hereof the title to said chattels shall vest in the said Rex Manufacturing Company without further act, and the policies of insurance issued in the name of said R. Hoe & Co. shall be transferred to the said Rex Manufacturing Company.

“It is further expressly provided and agreed that no other than the said Rex Manufacturing Company shall use the said chattels and that in the event of any use by others, or of any unauthorized removal of said chattels, or of attachments thereof, the said R. Hoe & Co. may take possession, without prejudice to their rights hereunder, or liability for tort or trespass for so doing, and that until the full performance of all the terms hereof,

the said chattels shall remain the property of the said R. Hoe & Co., and upon the full performance of all the terms hereof, the title to said chattels, without further act, shall vest in said Rex Manufacturing Company, and that until, and except in case of full performance of all of the terms hereof, all acts of part performance are and shall be deemed to be done on account of the use of, or right to use, the said chattels.

“And it is further agreed that if the insurance collected in case of loss is less than the amount unpaid under this agreement, or if the said Rex Manufacturing Company fail to keep the terms hereof, and said R. Hoe & Co. re-take the chattels pursuant to the terms hereof, and the said chattels are of less value than the amount unpaid hereunder, the said Rex Manufacturing Company will pay unto the said R. Hoe & Co. the said difference.”

The Rex Manufacturing Company paid one of the notes. The rest, though due, were not paid and were in the possession of R. Hoe and Company.

There was evidence tending to show that the Rex Manufacturing Company in April, 1907, had conveyed the premises where the chattels were situated to Stewart, the second defendant in the action of replevin, as trustee for certain bondholders of the company and also had given him possession; that on October 18, 1907, by an instrument under seal the Rex Manufacturing Company assigned to the United Cork and Seal Company, the plaintiff in the second action, all its right under the contract between it and R. Hoe and Company, and on October 22, 1907, Stewart as trustee executed and delivered a deed of the premises where the chattels were situated to the same company.

At the close of the evidence the defendants in the action of replevin asked the judge to rule that on all the evidence there should be a finding for them and that they were entitled to an order for the return of the replevied property; and the plaintiffs in the second action asked for the following rulings:

“1. On all the evidence the verdict must be for the plaintiff.

“2. If the defendants were entitled to take possession of the personal property in question at the time they did, such taking did not rescind the contract between them and the Rex Manu-

facturing Company, and there is no evidence in the case justifying a finding that such contract was ever rescinded.

“3. Said contract could not be rescinded by the defendants without first returning or offering to return to the Rex Manufacturing Company or the plaintiff the notes of the former held by the defendants, and the money received under said contract less a reasonable charge for rental and depreciation of the property.”

The rulings asked for all were refused, and the judge found for the plaintiffs in replevin and for the defendants in the second action. The defendants in replevin and the plaintiff in second action alleged exceptions.

The case was submitted on briefs.

H. T. Richardson, for the defendants in the first action and the plaintiff in the second action.

G. W. Estabrook, for the plaintiffs in the first action and the defendants in the second action.

BRALEY, J. In these cases, the rights of the parties depend on the written agreement under which the chattels described in the writ of replevin were sold and delivered to the defendant corporation. It is evident upon perusal of the contract, that the negotiable promissory notes were not given or accepted in payment of the purchase price, but only taken as collateral security. Until the consideration had been fully paid in money, it is also expressly provided, that the title was not to pass, but remained vested in the vendor, while any sums paid and received in part performance “shall be deemed to be done on account of the use of, or right to use, the said chattels.” If upon default the chattels had been taken without suit, no action to recover back the payments could have been maintained. *Lorain Steel Co. v. Norfolk & Bristol Street Railway*, 187 Mass. 500, 506. Upon failure of performance, the vendor therefore rightfully could appropriate the partial payments in satisfaction of the rental value of the property during the time it was held and used by the vendee, and retake the property, even if the notes, not having been negotiated although negotiation was permitted, were not tendered to the maker either before suit or at the trial. Nor were they bound, as the defendants contend, to show rescission. The contract being conditional with the conditions unperformed, and

there having been no election to treat the sale as absolute, the plaintiffs' title to the property never had been divested. *Martston v. Baldwin*, 17 Mass. 606. They also could resell, either before or after taking possession. *Hubbard v. Bliss*, 12 Allen, 590. However improvident from the vendee's present point of view some of its provisions may have been, it cannot be said that the contract was violative of morality or against public policy, and no reason appears why it should not be enforced. *Benner v. Puffer*, 114 Mass. 376. *New York Bank Note Co. v. Kidder Press Manuf. Co.* 192 Mass. 391. The vendee having defaulted, the plaintiffs could maintain replevin against the defendants, by whom the judge upon the evidence was warranted in finding the property was unlawfully held and detained. *Cottrell & Sons Co. v. Carter, Rice & Co.* 173 Mass. 155.

It follows from what has been said, that in the second case the plaintiff, who purchased with knowledge of the agreement, is bound by its terms and acquired no rights which it could assert in bar of the enforcement of the defendants' title. *Lorain Steel Co. v. Norfolk & Bristol Street Railway*, 187 Mass. 500.

The various rulings requested at the trial, to the refusal of which the defendants in the first case and the plaintiff in the second case excepted, were properly denied, and the exceptions must be overruled.

So ordered.

WALLACE L. PIEROE & others, executors & trustees, vs.
ELMER A. STEVENS.

Suffolk. January 18, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ

Tax, On inheritances, Exemption. Charity.

Under R. L. c. 15, § 1, as amended by St. 1906, c. 470, and St. 1906, c. 486, defining the kinds of property which are subject to a legacy and succession tax, a legacy to the trustees under a will for the maintenance of a free Latin school for the education of youths in a certain province of the Empire of Turkey is not exempt from the tax, although the trustees are authorized by the terms of the legacy to form a corporation to maintain such a school if it seems wise to them to do so, and after the death of the testator exercise this authority by forming a charitable corporation under R. L. c. 125, for the purpose of carrying out this

clause of the will. Whether a legacy for the same purpose would be exempt from the tax if made to a charitable corporation in existence in this Commonwealth at the time of the death of the testator, here was not considered.

KNOWLTON, C. J. This is a bill for instructions, brought in the Probate Court by trustees appointed under the will of Michael Anagnostopoulos. The question is whether the property passing under the residuary clause of this will is subject to an inheritance tax under the R. L. c. 15, § 1, as amended by the St. 1905, c. 470, and the St. 1906, c. 436. This residuary clause is as follows: "All the rest, residue and remainder of the estate, both real, and personal and wheresoever situated, of which I shall die seised or possessed or to which I shall be at the time of my decease in any way entitled, I give, devise and bequeath to my Trustees hereinafter named and their heirs and assigns forever; but in trust, nevertheless, to manage, invest and reinvest the same, changing investments from time to time as shall seem to them proper, and one sixth part of the net income thereof to pay in semiannual payments to the Board of Managers of the Kallineian Free Schools for Girls at said Papingon for the period of ten years after my decease, and the remaining five-sixths of the net income thereof during said period of ten years to apply in such manner as they shall see fit to the maintenance of a Latin School to be of the highest grade possible under the circumstances and as far as possible similar to the best German 'Gymnasia,' to be entirely a free school for the education of youths without distinction of race, creed, colour or social condition, to be located either at Konitza or in Janina, or in some other town of the Province of Epiros west of Janina.

"At the expiration of ten years after my decease I direct that one sixth part of the capital of said trust fund shall go to the Board of Managers of the Kallineian Free Schools for Girls at said Papingon, and that the remaining five-sixths of said capital shall be applied in such manner as my Trustees shall deem best to the permanent establishment and maintenance of such Latin School as is hereinbefore described, and in making such application of the income and principal of said trust fund for the maintenance of such Latin School, I give to my said Trustees and to whoever shall be Trustees under this my will full power and authority to adopt such method as shall seem to them best

suited for the purpose, by payment of said income and capital to any person or persons or corporation, to be held by him, them or it and applied for the purpose herein indicated, or otherwise, and I authorize the Trustees under this my will to form a corporation to maintain such school if it shall seem wise to them so to do. And I direct that the receipt of such person or persons or corporation for all sums of money so paid to it or them by my Trustees and for all property delivered to it or them by my Trustees shall be a complete discharge to my Trustees, and that thereafter my Trustees shall be under no further liability to account for the same or to see to the application thereof."

The trustees have caused a corporation to be formed under the R. L. c. 125, for the purpose of carrying this clause of the will into effect. It was decided by the Probate Court that the one sixth part of the residue of the estate which is given in trust for the board of managers of the Kallineian Free Schools for Girls at Papington is subject to the tax, and that the remaining five sixths of the estate is not subject to the tax. From the decree relative to the one sixth part no appeal was taken. But from the decree relative to the five sixths part the treasurer and receiver general of the Commonwealth appealed to the Supreme Judicial Court. The case was reported by a single justice * to the full court. The question is whether this gift is within either of the exemptions created by the statute. These are three in number. The first is of gifts "to or for the use of charitable, educational or religious societies or institutions, the property of which is by law exempt from taxation"; the second is of property given "to a trustee or trustees for public charitable purposes within the Commonwealth"; and the third is of property given "to or for the use of a city or town for public purposes." R. L. c. 15, § 1. The public charitable purposes for which each of these gifts was made are not within the Commonwealth, but in a distant foreign country, and it is not contended that the gifts are within either of the last two exemptions. It is contended by the corporation that it is a charitable and educational institution whose property is by law exempt from taxation, and that therefore no tax can be collected upon the

* *Braley, J.*

property that passed to it from the trustees under the will. If the corporation had been in existence when the will took effect, and if the will had passed the property from the testator's estate directly to it, there would be strong ground for its contention. The right of the Commonwealth to its tax, as well as the rights of others claiming under the testator's will, vested at the time of his death. *Hooper v. Bradford*, 178 Mass. 95. When the will took effect, the property in question vested in the trustees immediately. The question whether it is subject to the tax is to be determined upon the conditions then existing. In this respect the case is like *Codman v. Brigham*, 187 Mass. 309, 312, 318, in which the court said, "The trust is for charitable uses, and the instrument creates, from the death of the testator, a public charity. . . . This charitable trust comes into existence immediately on the probate of the will, and it comprises all the rest and residue of the estate, except so much as is needed to make the payments called for in the seven provisions above referred to. Not only the legal but the equitable estate vests immediately, the legal estate in the trustees, and the equitable in that part of the public which is to be benefited. . . .

"It is provided that the fund shall be held and accumulated for twenty-five years before it shall be put to active use for the relief of the suffering. . . .

"These and other provisions, in regard to the management of the property, the payments from the income of the sums due the annuitants, the establishment of a corporation, and the transfer of the property to the corporation, are all mere details of administration which the testator saw fit to prescribe, and which do not affect the general character of the charitable gift, or the nature of the title created by the clause in question. Nothing passes directly to the corporation under the will. It takes through a conveyance from the trustees, made in the execution of their trust. *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303, 312. *Jones v. Habersham*, 107 U. S. 174. *Crerar v. Williams*, 145 Ill. 625, 648. The corporation is simply a part of the machinery to be provided by the trustees, the better to execute the charitable purpose of the testator. If for any reason it should be impossible to establish such a corporation, the gift would not fail, but the court would apply the doctrine of *cy pres*,

and provide some other method of administering the charity to accomplish substantially the same result. *Darcy v. Kelley*, 153 Mass. 433, 437. *Weeks v. Hobson*, 150 Mass. 377. *Amory v. Attorney General*, 179 Mass. 89, and cases above cited."

In the present case there was no requirement that a corporation should be formed. The testator merely gave the trustees full power and authority to adopt such method as should seem to them best suited to the purpose of administering the trust. They might or might not form a corporation, and if they formed one, the receipts of the corporation were to be a protection and discharge for all sums of money paid over to it. There is no ground for a contention that the property did not vest in the trustees upon the death of the testator, so that it became subject to the tax. There is no ground for a contention that, by electing to form a charitable corporation under the laws of Massachusetts, instead of forming a corporation in some other State or country, or not forming a corporation at all, they could relieve the property from liability to taxation, or affect the rights of the Commonwealth in any way. *Kingsbury v. Chapin*, 196 Mass. 538, 538. The liability to pay taxes was not upon a passing of the property from the testator to the corporation; but upon the gift of it from him to the trustees, for the benefit of children in Turkey. This gift took effect absolutely upon his death.

The case of *Balch v. Shaw*, 174 Mass. 144, relied on by the corporation, was very different. In that there was a deed of trust for the payment of certain annuities during the lifetime of the settlor and the payment of one annuity after her death, with a provision that on her decease the balance of the property should be disposed of for charitable purposes, in such a way as should be determined by a board of seven members nominated in the deed, who were to be called the Board of the J. W. Randall Fund. This board determined that a charitable corporation should be organized under the laws of Massachusetts, and that the property should be turned over to it for charitable uses. The decision of the court was put upon the ground that there was no gift of the fund to any one, within the intent of the act, until this board decided what should be done with it, and that then the gift was to the corporation directly. The court said: "This board had merely a power of appointment, and until such ap-

pointment was made and acted on there was no gift to any one within the intent of the act. When the appointment was made, the effect was the same as if the name of the corporation had been written in the deed as the donee. *Emmons v. Shaw*, 171 Mass. 410."

The decision in *In re Graves*, 171 N. Y. 40, is founded upon a statute of New York, intended to relieve testators from previous decisions of the courts adverse to the creation of charitable trusts, and to provide a way in which such trusts can be administered by the courts. See *Allen v. Stevens*, 161 N. Y. 122. It has no application to a case like the present, under the laws of this Commonwealth.

Decree of Probate Court reversed; entire residue subject to tax.

H. Wheeler, for the plaintiffs.

D. Malone, Attorney General, & *F. T. Field*, Assistant Attorney General, for the defendant.

WILLIAM R. CLARK vs. RAYMOND P. DELANO.

Suffolk. January 18, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Agency, Duty of broker. Trust, Constructive.

A broker, who undertakes to procure a loan for an owner of land which is subject to a mortgage either by the giving of a new mortgage or by a pledge and assignment of the existing mortgage as security, if he honestly and continuously tries to obtain such a loan and is unsuccessful, is not precluded from buying the mortgaged property in good faith in his own behalf at a sale in foreclosure of the mortgage and procuring a new mortgage on it for his own benefit, his employment as a broker, which created a fiduciary relation between him and the owner of the land, having been terminated without fault on his part when it became too late to prevent the foreclosure sale.

BILL IN EQUITY, filed in the Supreme Judicial Court on August 2, 1909, by the surviving trustee under the will of William R. Clark, late of Boston, who as such trustee was on June 26, 1909, the owner, subject to a mortgage, of certain lots of land in that part of Boston called Dorchester, which on that

day were purchased by the defendant in his own behalf at a foreclosure sale for the sum of \$6,500, which sum the defendant procured by making a new mortgage of the land, alleging that when the defendant purchased the land he was in the relation of broker to the plaintiff, by whom he had been employed to procure a new mortgage of the land for the benefit of the plaintiff in order to prevent a foreclosure of the then existing mortgage; praying that an injunction might issue restraining the defendant from conveying or encumbering the land, that the defendant might be ordered to convey the land to the plaintiff subject to the new mortgage for \$6,500, and for further relief.

The case was referred to William Harold Hitchcock, Esquire, as master. He filed a report, of which the conclusion is stated in the opinion. Later the case came on to be heard upon the defendant's exceptions to the master's report before *Braley, J.*, who made a final decree overruling the exceptions to the master's report and ordering that the defendant should convey the land to the plaintiff, subject to the new mortgage, upon certain conditions therein specified. The defendant appealed.

S. W. C. Downey, for the defendant.

J. D. Graham, for the plaintiff.

KNOWLTON, C. J. On June 3, 1909, the plaintiff was the owner of certain real estate in Boston, subject to a mortgage of \$5,500 and interest, held by one Roberts, and to a lien for unpaid taxes. The mortgagee had previously requested payment of the mortgage debt, and on that day he began proceedings for a foreclosure of the mortgage by giving notice of a sale under a power in the mortgage, to take place on June 26, 1909. The plaintiff sought to raise money to pay the debt, either by giving a new mortgage or by procuring an assignment of the old mortgage as collateral security. With this in view he applied to several brokers, advertised in a newspaper, and personally solicited several individuals for a loan. Previously, before the end of the month of May, he had employed the defendant, who was a real estate broker, to act for him in endeavoring to procure the desired loan, subject to a right reserved to the plaintiff to employ other brokers and to use other means to procure the loan.

Between the date of this employment and June 18, the plaintiff and the defendant saw each other several times. On each

occasion the defendant reported that he had not been able to procure a loan, but spoke hopefully of the probability of ultimate success. The plaintiff did not at any time tell the defendant that the property was advertised for sale under the mortgage, and the defendant first learned of it by seeing a notice of the sale, just before June 18. On June 18 or 19, the parties met for the last time before the sale. The defendant then said he had not been able to secure a loan, and, referring to the foreclosure, advised the plaintiff to apply to his own bank if he wished to save the property. The plaintiff replied that he had done so without success, and asked the defendant to continue his efforts to procure the loan. To this request the defendant made no definite answer. The master found that the plaintiff believed and was warranted in believing that the defendant would continue his efforts. Nothing more was done by either party about the business. During the first part of the week before the sale, the plaintiff and the mortgagee met, and the plaintiff, in view of a recent payment by him of a part of the taxes on the property, asked the mortgagee to stop the proceedings for foreclosure. This the mortgagee declined to do, and he said that he supposed there would be no one at the sale, and that he (the mortgagee) would have to bid off the property in his own interest and that of the plaintiff. Relying upon this statement, the plaintiff did not attend the sale. On June 26 the sale was held according to the notice, the only persons present, besides the auctioneer, being the mortgagee, the defendant and a stranger. The defendant bid off the property for \$6,500, the next highest bid of \$6,000 having been made by the stranger. Subsequently the defendant obtained a mortgage loan of \$6,500 upon the property from the Dorchester Trust Company, in which he was a stockholder and a member of the examining committee. On May 22, 1909, one Paul, another broker employed by the plaintiff, had applied to this company on behalf of the plaintiff for a loan of \$6,000, to be secured by a mortgage on the land, and had been refused.

The defendant testified before the master that he conceived the idea of purchasing this property at the sale on the day before the sale, and definitely made up his mind to bid for it on the day of the sale. The master found that there was no evidence to warrant a conclusion that he entertained this purpose earlier

than the time that he stated. At the time of the sale the defendant had made no arrangement for obtaining the money necessary to purchase the property. He first made an application for a loan to the Dorchester Trust Company two days later. He had some property besides his stock in the trust company, and thought that he could obtain the money there. According to the master's report, there was no evidence before him that the defendant did not act in good faith in purchasing and mortgaging the property, under the circumstances stated, or that he did not believe that he had a right to do so. Solely as a conclusion from the facts stated in the report, the master found that, by undertaking to act as a broker to procure a loan for the plaintiff, the defendant entered into such a fiduciary relation to the plaintiff that he could not buy the property at the foreclosure sale for his own benefit, and give a mortgage to secure a loan for the whole purchase price, on his own account. The question is whether this conclusion of the master is correct.

There is no evidence that the defendant did not act in good faith in the interest of the plaintiff, in attempting to procure a loan. Up to the time appointed for the sale there is no ground on which the defendant can be held for any wrongful act or omission. When the property was offered for sale by the auctioneer and it was no longer possible to do anything for the benefit of the plaintiff, under his employment as a broker, was the defendant, by reason of that employment, in such a relation to the plaintiff as precluded him from bidding at the auction as any other person might do? This question must be answered in the negative. His employment was terminated by conditions beyond his control. When the auctioneer began the sale, there was nothing more that he could do for the plaintiff as a broker. In reference to the sale which was going on, he stood as if he had never been employed by the plaintiff. If a sale must be made, there was nothing in his buying which was inconsistent with his former relations to the plaintiff. He had never been employed to represent the plaintiff in any way in connection with the sale. His only employment was to procure a loan if he could, and if he succeeded the plaintiff doubtless would have prevented the sale; but when it was too late to prevent the sale, he was as free as anybody to become a bidder. In his purchase there was no

constructive trust for the plaintiff. *Collins v. Sullivan*, 135 Mass. 461. *O'Reiley v. Bevington*, 155 Mass. 72.

It makes no difference that he subsequently procured a loan upon the property on his own account. When he had become the purchaser, he stood in a new and independent relation. He might pay in cash if he found it convenient, or he might raise the money by a mortgage, or in any other legitimate way. His procuring a loan for himself, after his purchase, had no connection with his original employment.

Decree reversed.

MICHAEL F. CLARKE vs. FRANKLIN L. FAY & others,
trustees.

Suffolk. January 18, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Equity Jurisdiction, To reach and apply equitable assets. *Bankruptcy*. *Trust*.
Devise and Legacy.

In a suit in equity under R. L. c. 159, § 3, cl. 7, to reach and apply to the payment of a debt due to the plaintiff from the principal defendant the interest of that defendant under the will of his grandfather, such defendant's share as one of his father's children in a fund of which his father, who is living, enjoys the income, which will pass to such defendant in case he survives his father but not otherwise, is a present equitable interest, which, although it may be lost by the death of such defendant before the death of his father, is assignable property, the value of which can be ascertained by sale, appraisal or some other means within the ordinary procedure of the court, and which therefore can be reached and applied under the statute.

Under § 70 a (5) of the bankruptcy act of 1898, which provides that the trustee of the estate of a bankrupt shall be vested with the title of the bankrupt to all property which "he could by any means have transferred," the interest of the bankrupt under a will in a fund of which his father, who is living, enjoys the income, and a share of which will pass to the bankrupt in case he survives his father but not otherwise, vests in the trustee.

In a suit in equity under R. L. c. 159, § 3, cl. 7, to reach and apply to the payment of a debt due to the plaintiff from the principal defendant the interest of that defendant under the will of his grandfather, it appeared that that will gave the residue of the testator's property to trustees, and, after providing for certain trusts, directed that all the residue of his estate should be divided into as many equal shares as there should be at the time of his decease children of his then living or deceased leaving issue, and then, after providing for the management of the trust and the payment of its expenses, proceeded as follows: "to pay

over the residue of the income of such share to the child for whose benefit such share is held, . . . for and during the term of such child's natural life and upon such child's death to convey transfer and pay over the principal of the share so held for such child's benefit to such child's lawful issue then living by representation; but if such child shall die without leaving lawful issue living at the time of such child's death then upon such child's death to add the principal of the share held for such child's benefit equally to the shares held for the benefit of my other children then living . . . provided however that the lawful issue then living of any other child of mine who shall have theretofore deceased shall take and have (and there shall be paid and conveyed to such issue) — by right of representation the same part of such principal which would have been added to the share which would have been held for the benefit of such issue's deceased parent if such issue's deceased parent was then living." When the bill was filed the father of the principal defendant was living. That defendant had two unmarried sisters, who as well as he were born before the death of the testator. He had had five aunts who were living at the death of the testator, one of whom had died, leaving issue, one of whom was a childless widow, two of whom were married, each of them having a married son without issue, and one of whom was married and had a minor unmarried son. *Held*, that the interest of the principal defendant in his share of the fund of which his father enjoyed the income, although his enjoyment of it was contingent on his surviving his father, was assignable property which could be reached and applied under the statute, but that his interest in the funds of which the incomes were enjoyed respectively by his aunts, and a part of which would come to him if after his father's death and during his own lifetime any of his aunts should die without leaving issue, was not property but a mere possibility of property, which could not be reached under the statute.

BILL IN EQUITY, filed in the Superior Court on September 8, 1908, under R. L. c. 159, § 8, cl. 7, by a creditor of Franklin L. Fay, seeking to reach and apply to the payment of the debt due to the plaintiff the interest of Franklin L. Fay under the provisions of the will of his grandfather, who also was named Franklin L. Fay.

Upon the suggestion of bankruptcy of the defendant Franklin L. Fay, Rufus B. Sprague, the trustee in bankruptcy of his estate, was admitted as a party defendant.

The case was heard by *Wait, J.*, who was of opinion that the defendant Franklin L. Fay had an interest which could be reached by his creditors and which passed to his trustee in bankruptcy, and made a final decree directing that the interest of the defendant Franklin L. Fay in the estate of his grandfather Franklin L. Fay should be sold and that the proceeds should be applied, first to the payment of the costs and expenses of the sale, second to the satisfaction of the plaintiff's claim, which was \$414.35, with interest to the date of the sale

and the costs of suit, and third that any balance remaining should be paid to the trustee in bankruptcy. The defendant Franklin L. Fay appealed.

G. C. Dickson, for the defendant Franklin L. Fay.

R. B. Sprague, trustee in bankruptcy, *pro se*.

C. F. Eldredge, for the plaintiff.

RUGG, J. This is a bill in equity brought by a creditor of Franklin L. Fay to reach and apply his interest under the will of his grandfather, Franklin L. Fay, toward the payment of the plaintiff's debt. More than four months after the filing of the bill the defendant was adjudicated a bankrupt, and his trustee has become a party hereto. The testator at his death in 1885 left five daughters and one son, the latter being the father of the defendant. The will created certain trusts for the benefit of the widow and a brother of the testator during their several lives, the other provisions of the will being subject to these life interests. The general scheme of the other provisions is in substance as follows: All the remainder of the estate is left in trust for the testator's children for life, they to receive the income, and upon the death of any of the testator's children leaving issue then living the issue is to take the parent's share, and if any of the children die before the testator, leaving issue living at his death, such issue shall take its parent's share, and if such issue is a minor the share is to remain in trust until such minor reaches majority. Upon the death of any of the testator's children his or her share is to go to the issue then living. If any of the testator's children shall die leaving no issue living, then his or her share is to fall in for the benefit of the other living children of the testator, provided that the lawful issue then living of any other child, who shall have theretofore deceased, shall take and have the same part of such principal which would have been added to the share which would have been held for the benefit of the deceased parent of any such issue if then living. But in the event of all of the testator's children dying and leaving no issue living, then to the testator's brothers and sisters then living, the issue then living of a deceased brother or sister to take its parent's share, and in the event of the failure of all these then to the testator's heirs at law. The precise language of the will, so far as it describes the interest of the

defendant, after providing for the trust for life for the benefit of the defendant's father and aunts, who were the children of the testator, is that the trustees are "upon such child's [that is, child of the testator] death to convey transfer and pay over the principal of the share so held for such child's benefit to such child's lawful issue then living by representation; but if such child shall die without leaving lawful issue living at the time of such child's death then upon such child's death to add the principal of the share held for such child's benefit equally to the shares held for the benefit of my other children then living; . . . provided however that the lawful issue then living of any other child of mine who shall have theretofore deceased shall take and have . . . by right of representation the same part of such principal which would have been added to the share which would have been held for the benefit of such issue's deceased parent if such issue's deceased parent was then living." The defendant is married but has no children. He has two unmarried sisters, who, as well as himself, were born before the decease of the testator, and his father is still living. Of his five aunts, who survived the testator, one has since deceased leaving two unmarried minor daughters, one is a childless widow, two are married each having a married son without issue, and one is married having a minor unmarried son.

The question is whether the interest of the defendant in the estate of his grandfather can be attached and sold for the plaintiff's debt, and whether any excess passes to his trustee in bankruptcy. There can be no doubt that the direction to the trustees upon the death of each of the testator's children, including the defendant's father, to convey the share held for such child's benefit to "such child's lawful issue then living by right of representation" created a contingent interest. The words "then living" must refer to the death of the child and not of the testator. Whether the defendant will ever take anything under this provision depends upon the contingency of his surviving his father. It is wholly uncertain whether this event will ever happen.*

But this determination is not decisive of the ultimate question

* *Hulburt v. Emerson*, 16 Mass. 241. *Olney v. Hull*, 21 Pick. 311. *Thomson v. Ludington*, 104 Mass. 193. *Butterfield v. Hamant*, 105 Mass. 338. *Bamforth v. Bamforth*, 123 Mass. 280. *Smith v. Rice*, 130 Mass. 441. *Denny*

in the case. A closer analysis of the will is necessary to ascertain with precision the interests which it creates for the benefit of the defendant. The interest which he has in the share, of which his father enjoys the income during life, is contingent upon his surviving his father, and upon that alone. This interest may be treated as a unit. It may in fact be larger or smaller, dependent upon the decease of one or more of his aunts without leaving surviving issue before the decease of his father, and also in some degree upon whether either or both of his sisters predecease him without leaving surviving issue and also upon whether other brothers or sisters may be born and survive his father, but these are considerations which concern only the amount, and not the fact of his interest. His realization in actual possession of this unit, whatever its size may finally turn out to be, depends upon the single contingency that he survive his father. But he has another and independent beneficial possibility under the will; namely, that during his life one or more of his aunts may survive his father and die without leaving lawful issue then surviving them. In such an event he will share, with the other then living issue of his father, the portion of which his father would have received the income during his life, had he survived. The reduction to possession by the defendant of this possible benefit is more contingent than that first described for the reason that it depends not only upon his outliving his father, but upon the further uncertainties that he outlive the aunt, and that she survive his father and then decease without leaving lawful issue then surviving her.

The point presented for decision is whether either of these

v. Kettell, 135 Mass. 138. *Colby v. Duncan*, 139 Mass. 398. *Wood v. Bul-
lard*, 151 Mass. 324, 333. *Harding v. Harding*, 174 Mass. 268. *Cronan v.
Adams*, 185 Mass. 436. *Gardiner v. Savage*, 182 Mass. 521. *Crapo v. Price*,
190 Mass. 317. *Bigelow v. Clap*, 166 Mass. 88. *Boston Safe Deposit & Trust
Co. v. Blanchard*, 196 Mass. 35. *Hale v. Hobson*, 167 Mass. 397. *Coveny
v. McLaughlin*, 148 Mass. 576. *Galladay v. Knock*, 235 Ill. 412. *Lawrence v.
Phillips*, 186 Mass. 320. *Jones v. Jones*, [1906] 1 Ch. 570. *Dary v. Grau*,
190 Mass. 482. *Jackson v. Jackson*, 153 Mass. 374. *Morrill v. Phillips*, 142
Mass. 240. *McCreary v. Coggeshall*, 74 S. C. 42. *Fisher v. Wagner*, 109 Md.
243. *Reichard's appeal*, 116 Penn. St. 232. *Young v. Young*, 97 N. C. 132.
Darnell v. Barton, 75 Ga. 377. *Teets v. Weise*, 18 Vroom, 154. *Howbert v.
Cauthorn*, 100 Va. 649. *Hopkins v. Keazer*, 89 Maine, 347, 356. See *Lehn-
dorf v. Cope*, 122 Ill. 317, 331.

interests is of such a nature that it can be reached by a creditor's bill under R. L. c 159, § 3, cl. 7. We consider first his interest in the share of which his father enjoys the income during his life. As the question is one of nicety and difficulty, it will be helpful to review some of our cases.

In *Gardner v. Hooper*, 3 Gray, 398, the will under consideration, after creating a life estate, provided that at its determination the executor should divide the estate into fifths, and pay one share to each of the testator's five children, and then proceeded: "But should any of my children die before my wife, leaving issue living at the time of her decease, I give to such issue the share which the parent would have had, if living. And if any should die before my wife, and without issue living at the time of her decease, I give the share of such to be equally divided, one part to each of my children who may then be living, and one part to the issue of each that may not be living." The question was as to the right of one of the daughters during the life of the testator's widow, and it was held that, although the gift was so far contingent that if she failed to survive the widow it would not come to her, yet such a right was not a mere possibility but an existing interest, which, though in a certain sense contingent, would pass to an assignee in insolvency. In *Nash v. Nash*, 12 Allen, 345, the will provided that at the termination of a life estate the property should go "to such of my children as may be then living." It was held that during the life of the life tenant the interest of one of the children, although contingent and not vested during her life, was something more than a mere possibility and would pass to an assignee in insolvency. In *Dunn v. Sargent*, 101 Mass. 336, a life estate was created for the benefit of a son with remainder to his children and remainder over to such of the life tenant's brothers and sisters as might survive him. It was held that the right of a brother of the life tenant, although not devisable nor transmissible, was assignable and capable of alienation, subject to the contingency, because although not vested in possession and subject to be defeated by death before the life tenant, yet it was vested in right. The testator in the will under consideration in *Belcher v. Burnett*, 126 Mass. 230, after creating a life tenancy, directed real estate "to be equally divided among all my grand-

children who shall be living" at the decease of the survivor of the life tenants. It was said that though this was a contingent remainder, which would not vest in possession until and unless the grandchild survived the life tenants, yet it was "vested in . . . right from the death of the testatrix, capable of alienation . . . and . . . such an interest as would pass to an assignee under the insolvent law of the Commonwealth, or under the United States bankrupt act of 1841." *Whipple v. Fairchild*, 139 Mass. 262, interpreted a deed of trust, which created a life estate with power of appointment and directed a conveyance, in default of the exercise of the power, to the heirs of the grantor. It was held that each of the children of the grantor took "an equitable interest, which, although it might be defeated by the contingency, either of his death before the father, or of the father's conveying under the power, was assignable by him." In *Wainwright v. Sawyer*, 150 Mass. 168, the will created a life estate with power of alienation, and then provided that when the youngest of several children reached the age of twenty-one years certain property should be divided equally among the children then living. It was held that the interest thereby created in a child before the time of distribution was not a mere possibility, but a fixed right liable to be defeated only by death or alienation before the time for distribution, and that such an interest was assignable. In *Alexander v. McPeck*, 189 Mass. 34, the court after construing the will to mean that it gave to the legatee a right to the fund provided he survived the life tenant and a right under other circumstances to have it administered as a part of his estate, said: "Each of these rights is contingent, the first upon his surviving the widow, the second upon his dying before her and leaving no issue surviving her, and the third upon his having no issue living at the time of his death. His interest in each right is now vested in the sense that he owns the right. If in their nature they are property, they are his property. There can be no doubt that although each is a vested right in an equitable contingent remainder, it is capable of being alienated by him and of passing by assignment in insolvency or bankruptcy. . . . Such a right is property." In *Putnam v. Story*, 132 Mass. 205, a life estate was created for the benefit of a daughter of the tes-

tator, and the will then provided that "at her decease the capital sum to be equally divided among the heirs of my said daughter." It was held that children of the daughter during her life each took an interest in the nature of a contingent remainder liable to be defeated by failure to survive the parent, but that a vested interest in a contingent remainder was taken and that this contingency did not prevent the vesting of a right transferable in its nature, which could be assigned and would pass to assignees in bankruptcy or insolvency. The rule laid down by Chancellor Walworth in *Moore v. Lyons*, 25 Wend. 119, was quoted with approval, which has also been adopted in *McArthur v. Scott*, 113 U. S. 340, 379, to wit, "where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event which must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainderman is *in esse* and ascertained; provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession."

The facts and the language interpreted in these cases make them indistinguishable from the one now under consideration. The principles laid down govern the determination of the rights of the defendant in the trust fund of which his father receives the income. He was in being at the time the will became effective by the death of the testator. He was the issue of his father and could by no contingency be deprived of the certainty of sharing in the fund, provided he was alive at the death of his father. He was ascertained as the person who must inevitably take under the devise, provided he lived, and although the amount of this share may be augmented by the death of one or more of his aunts without issue during the life of his father and may be diminished or increased by the birth or death of brothers and sisters he can under no circumstances be deposed or ousted by any other person or class. The legacy to him took effect in a fixed right which must ultimately ripen into an absolute title coupled with possession unless defeated by his death before that of his father. To use the language of our cases, this is something more than a mere possibility, and was a "vested interest

in a contingent" right. It is property, and is such an interest as could be assigned.*

It remains to inquire whether its value "can be ascertained by sale, appraisal or by any means within the ordinary procedure of the court," within the meaning of those words as used in R. L. c. 159, § 3, cl. 7. *Alexander v. McPeck*, 189 Mass. 34, and *Biggert v. Straub*, 193 Mass. 77, seem decisive on this point in favor of the petitioners. See also *Heath v. Widgeon*, [1907] 2 Ch. 270.

The further inquiry remains whether an interest of this description passes to the trustee in bankruptcy of the defendant. That it would have passed to the assignee in insolvency or bankruptcy under our insolvent laws and early United States bankruptcy acts has been expressly decided. *Gardner v. Hooper*, 3 Gray, 398. *Nash v. Nash*, 12 Allen, 345. *Belcher v. Burnett*, 126 Mass. 230. *Putnam v. Story*, 132 Mass. 205. Such seems to be the law of New York. *Smith v. Scholtz*, 68 N. Y. 41, 61. It is clear that it would pass under the English bankruptcy act. *Higden v. Williamson*, 3 P. Wms. 132. Robson, Bankruptcy, (6th ed.) 459. *Davidson v. Chalmers*, 33 Beav. 653. *Hensley v. Wills*, 16 L. T. (N. S.) 582. There is nothing in the present bankruptcy act to call for a different result. U. S. St. July 1, 1898, c. 541, in § 70 a (5) provides that the trustee shall be vested with the title of the bankrupt to "property which . . . he could by any means have transferred." This language by its plain terms covers an interest like that of the defendant in the share of which his father has the income during life. Some decisions of federal circuit or district courts appear to be in conflict upon this subject.† But it is not necessary to review or analyze them for the reason that they have

* *Minot v. Purrington*, 190 Mass. 336, 339. *Huntress v. Allen*, 195 Mass. 226. *Dodd v. Winship*, 144 Mass. 461. *Butterfield v. Reed*, 160 Mass. 361. *Cummings v. Stearns*, 161 Mass. 506. *Shaw v. Eckley*, 169 Mass. 119. *Gilkie v. Marsh*, 186 Mass. 336. *Hills v. Barnard*, 152 Mass. 67. *Scott v. West*, 63 Wis. 529, 573. *Welsh v. Woodbury*, 144 Mass. 542. *Merriam v. Simonds*, 121 Mass. 198, 202. *Minot v. Tappan*, 122 Mass. 535.

† *In re Hoadley*, 101 Fed. Rep. 233. *In re Ehle*, 109 Fed. Rep. 625. *In re St. John*, 105 Fed. Rep. 234. *In re Wetmore*, 108 Fed. Rep. 520. *In re Twaddell*, 110 Fed. Rep. 145. *In re Gardner*, 106 Fed. Rep. 670. *In re McCrea*, 161 Fed. Rep. 246.

been based upon State statutes or judgments in some instances differing from our own.

This opinion thus far relates to that portion of the testator's estate which may come to the defendant under that part of the will which gives to him upon the death of his father the principal of the share held for the benefit of the latter during his life. But the will contains the further provision, which may inure to the advantage of the defendant, to the effect that if, after his father's death, any of his surviving aunts deceases without leaving issue her surviving, the share held for the benefit of such aunt shall be divided among the shares held for her living sisters, the then living issue of any deceased brother or sister taking, by right of representation, the part thereof which would have been added to the share held for the deceased parent of such issue, if living. The interest of the defendant under this provision is contingent in every respect. The defendant belongs to a class removed to the third degree from the possibility of financial advantage from this source. Whether such aunt may leave issue surviving her cannot be determined with certainty until her death. Whether she will survive the defendant's father is conjectural, and whether the defendant will be alive at her death is equally matter of speculation. Any one of these contingencies happening adversely will defeat the hope of his reaping gain under this provision. It is not an interest in any respect vested in him, and amounts to a mere possibility. Hence it cannot be reached by a creditor's bill nor pass to his trustee in bankruptcy. As was said by Morton, C. J., in *Putnam v. Story*, 132 Mass. 205, at p. 210: "In the case of a devise or bequest to a man for life and at his death to his heirs, it is true that, if he has no children at the death of the testator, his heirs presumptive would not take a vested interest, because there is the contingency that they may be supplanted or displaced as heirs presumptive by the birth of children to the life tenant, and therefore that they may never take at all, even if they survive the life tenant." *Putnam v. Gleason*, 99 Mass. 454. *Lavery v. Egan*, 143 Mass. 889.

The decree is to be so modified as to clearly exclude from the sale of the defendant's interest in the estate of his grandfather, the possibility that he may directly receive some portion of a

share held for the benefit of each of his aunts, and as modified is affirmed.

So ordered.

JAMES E. BAGLEY vs. WONDERLAND COMPANY & others.

Suffolk. January 19, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Employer's liability. Partnership. Evidence, Admitted without objection. Joint Tortfeasors.

In an action by a foreman plumber against his employers for personal injuries, there was evidence that between daylight and dark on a cloudy night in June the plaintiff's employers sent him to a pump house to try the valves which controlled the water supplied for a chute, and to see what the matter was which prevented the water from flowing down the chute as it should; that the valves were turned from a window in the pump house and to reach this window it was necessary to pass along a passageway inside the pump house about eighteen inches wide between the side of the pump house and unguarded cog wheels in motion; that the pump house had been built and the machinery installed in it after the plaintiff was employed by the defendants; that he had not been to the place for fifteen days and never before had seen the pump in operation nor had had anything to do with opening or closing the valves; that there were certain glass oil cups on the machinery from which the oil dripped slowly on the machinery when it was in motion, that about a week before the accident one of these cups on the crank shaft, holding about a gill of oil, was cracked from top to bottom and had a piece nicked out of it; and that the oil from this cup ran down upon the floor in such quantities as to be tracked about; that notice of this condition had been given to the defendants, but that the cup was not changed before the accident; that the plaintiff, coming from the greater light out of doors and walking in the dark toward the window to regulate the valves, slipped by reason of the oil on the floor and his arm was caught on the revolving cog wheels and was mangled; that within a few minutes after the accident there was oil on the floor for the width of the passageway and for a length of four or five feet; that the passageway "was pretty well covered with oil" and there were marks as if a man had slipped; that oil was dripping on the floor from the cracked cup and that no oil came upon the floor from any other source. *Held*, that the question whether the plaintiff was in the exercise of due care was for the jury, and that it was for the jury to say whether in the dusk he could have seen the condition of the floor or should have procured more light before proceeding toward the window. *Held, also*, that the plaintiff did not assume the risk of such an injury by his contract of employment, because the broken oil cup and the slippery floor had come into existence after his contract of employment was made and he did not in fact know of the danger which caused his injury.

A workman can be barred on the ground of assumption of risk from recovery against his employer for injuries resulting from perils which have been created

since the making of his contract of employment only when he voluntarily has continued in the service after appreciating the nature and extent of the added exposure to danger.

In an action by a foreman plumber, employed by a firm consisting of two members who were performing certain work under a contract with a corporation conducting an amusement park, against his employers and the corporation, for injuries received by slipping upon an oily floor in the passageway of a pump house so that his arm was caught by the revolving cog wheels of the pumping machinery, when he had been sent to the pump house by one of his employers and also by an agent of the defendant corporation in order to try the valves and to see what the trouble was that prevented the water from flowing down a chute which was operated by the defendant corporation, it appeared that the slippery condition of the floor, of which the plaintiff had no previous knowledge, was due to the leaking of oil from a cracked and broken glass oil cup on the crank shaft of the pump, that the defendant corporation had used this cracked and leaky oil cup for several days in such a place that a large part of its contents continually flowed upon the floor of the passageway of the pump house near the machinery, where it was or might become necessary for others than those in charge of the machinery to pass, that, although the plaintiff's employers did not own the pump house nor operate the machinery, yet it might have been found to have been a part of their work to regulate the flow of the water down the chutes and to test the valves, and in order to do this it was necessary to go to the place where the plaintiff was injured. There was evidence tending to show that each of the plaintiff's employers knew of the leaking oil cup several days before the accident, and that one of them had promised to remedy it. *Held*, that there was evidence of negligence not only on the part of the defendant corporation but also on the part of the plaintiff's employers, who might have been found to be negligent in setting the plaintiff at work in a dangerous place of which he was ignorant without giving him any warning, and that, even if they had no right to change the oil cup, they had a knowledge of the danger which imposed upon them the duty to warn the plaintiff of its existence.

In an action by a foreman plumber for personal injuries against his two employers, alleging that they were copartners doing business under a firm name and in that name had a contract with another defendant, a corporation, for doing certain work, the plaintiff's employers raised the objection that there was no evidence of the existence of a copartnership between them. Their names were respectively A. and S. It was not questioned that a person or persons doing business as the A. and S. Construction Company had a contract with the defendant corporation for doing the work upon which the plaintiff was employed. It appeared that both A. and S. were upon the premises every day, and that A. had referred to S. as his partner, that S. hired men, gave directions indicative of a master's power and, when notified of the defective appliance which was the cause of the plaintiff's injury, "said he would have it seen to." A printed letter head used by A. bore the names of both A. and S. Several witnesses in testifying referred to "A. and S." as a firm, and this testimony remained in evidence without objection. *Held*, that there was evidence sufficient to warrant a finding of the existence of the copartnership.

Evidence, which would have been excluded as incompetent upon objection, if it is admitted and remains in the case without objection, should be given its probative force.

Wrongdoers acting independently, whose tortious acts or omissions concurrently contribute to the injury of a person, are liable to such person jointly.

TORT against Harry B. Aldrich and Edward L. Shea, alleged to be copartners doing business under the name of the Aldrich and Shea Construction Company, and against the Wonderland Company, a corporation organized under the laws of this Commonwealth and having a usual place of business at Revere, for personal injuries suffered by the plaintiff on June 13, 1906, while in the employ of the defendants Aldrich and Shea in connection with a contract made by them with the defendant corporation. Writ dated August 21, 1906.

The plaintiff's declaration as amended was as follows:

"First Count: And the plaintiff says that on June 13, 1906, the defendant the Wonderland Company was the owner and occupant of certain premises situated in the Town of Revere, called Wonderland, where the said Wonderland Company conducted certain amusements, that on said premises the said Wonderland Company maintained certain structures called 'chutes,' in which water flowed which was forced through certain pipes by means of a pumping machine; that said pumping machine was in a building called a pump house, and between the pumping machine and side of the pump house was a passageway about fifteen inches wide consisting of boards or planks; that said pumping machine and pump house were owned by the Wonderland Company and were under its care and control; that on said date the plaintiff was in the employ of the defendants Aldrich and Shea, who were contractors and as such were doing certain work for the Wonderland Company at Wonderland Park; that while the plaintiff was thus employed and was in the exercise of due care, by reason of the negligence of the Wonderland Company in maintaining said pumping machine in a dangerous and defective condition and said passageway in a dangerous and slippery condition and by reason of the negligence of the defendants, Aldrich and Shea in not providing a safe place for the plaintiff to work in and in setting the plaintiff to work in an unsafe place without informing him of the dangers to which he was exposed, said dangers being known to the defendants, but unknown to the plaintiff, the plaintiff's arm was caught in said machine and left in such condition that it had to be amputated and he was put to great expense for nursing, medicine, and medical attendance, was deprived of his wages

and earnings to a large amount and his capacity to labor was permanently impaired."

There was a second count under the employers' liability act, which the plaintiff waived at the trial.

In the Superior Court the case was tried before *Fessenden, J.* At the close of the evidence the defendants asked for twelve rulings. One of them, numbered 11, the judge gave as an instruction to the jury as follows: "Upon the evidence in this case, the place where the plaintiff was injured was not a place furnished by the defendants Aldrich and Shea for their employees to work in."

The fourth, sixth and tenth requests were waived by the defendants because they related to recovery on the second count of the plaintiff's amended declaration which he had waived.

The other rulings requested by the defendants were as follows:

"1. Upon all the evidence and pleadings in this case, the plaintiff is not entitled to recover against the defendant Wonderland Company.

"2. Upon all the evidence and pleadings in this case, the plaintiff is not entitled to recover against the defendants Aldrich and Shea.

"3. Upon all the evidence the plaintiff is not entitled to recover against the Wonderland Company upon the first count of his declaration."

"5. Upon all the evidence the plaintiff is not entitled to recover against Aldrich and Shea upon the first count of his declaration."

"7. Upon the evidence and pleadings in this case the plaintiff is not entitled to maintain his action against the defendants jointly.

"8. Upon all the evidence and pleadings in this case, the plaintiff is not entitled to maintain his action against the defendants jointly and severally.

"9. There is no sufficient evidence in this case of a partnership existing between the defendants Harry B. Aldrich and Edward L. Shea at the time the plaintiff was injured, and the plaintiff is not entitled to recover against them as partners in business."

"12. There is no sufficient evidence in this case that the defendant Wonderland Company furnished the place where the plaintiff was injured for the use of this plaintiff in the doing of the thing which he was engaged in doing at the time the accident happened."

The judge refused to make any of these rulings and submitted the case to the jury on the first count of the plaintiff's amended declaration with other instructions.

The jury returned a general verdict for the plaintiff against both defendants in the sum of \$8,500; and the defendants alleged exceptions.

M. O. Garner, for the defendants.

W. J. Barry & P. M. Keating, for the plaintiff, were not called upon.

RUGG, J. This is an action of tort to recover damages for personal injury. The plaintiff was a foreman plumber and piper in the employ of the defendants Aldrich and Shea, who were performing certain work under contract for or upon the estate of the other defendant, which owned and operated an amusement park. The injuries were sustained in a small building called the pump house, which contained a pump, by which water was forced to the top of a chute in the park down which it flowed, and contained also unguarded cog wheels and other machinery connected with the pump. The supply of water was through pipes regulated by valves just outside, and turned from, a window in the pump house, all of which had been built and installed after the plaintiff entered the employment and which had been in use about a fortnight before the accident. In order to reach that window it was necessary to walk partly around the pump and in a passageway about eighteen inches wide between the side of the building and the cog wheels. There was evidence which, given its full probatory force, would warrant the jury in finding that between daylight and dark of a cloudy June night the plaintiff was directed both by the defendant Aldrich and by an agent of the Wonderland Company to go to the pump house and try the valves and see what the trouble was with them, as the water was not flowing down the chute as it should; that he had not been to the place for fifteen days, and had never before seen the pump in operation, nor had anything

to do with opening or closing the valves; that on the evening in question inside the pump house "it was dark" and that the light was not such that he could see the appearance of the floor; that he did not know that there was oil on any part of the floor; that while walking toward the window to regulate the valves the plaintiff slipped by reason of oil on the floor, and his arm was caught on the revolving cog wheels and was mangled; that a glass oil cup holding about a gill on the crank shaft of the pump was cracked from top to bottom and had a piece nicked out of it about a week before the accident, and that from this cup oil ran upon the floor in such quantities as to be tracked about; that oil would last in this cup about ten minutes, and in the other oil cups on the machinery an hour and a half or more; that oil was constantly required in that cup when the machinery was in motion; that notice of this condition was given to the Wonderland Company and to Aldrich and Shea, the other defendants, but that the cup was not changed before the accident; that within a few minutes after the accident there was oil upon the floor, the width of the passageway, for a length of four or five feet; that it "was pretty well covered with oil" and there were marks as if a man had slipped, and that oil was dripping on the floor from the cracked cup, near the passageway; that no oil came upon the floor from any other source; that the pump had been operated for several days before the accident by employees of the Wonderland Company. Although there was other evidence which would have amply supported other views of the facts, especially as to the degree of light in the pump house, we must, after a verdict for the plaintiff, discuss the exceptions on the footing of inferences most favorable to the plaintiff.

1. There was sufficient evidence to support a finding that the plaintiff was in the exercise of due care. He was going into a building with whose general construction and arrangement of machinery he was familiar. Even though it may have been somewhat dark, the conditions as he had known them might reasonably have been assumed to remain permanent, in view of the uses of the building, and although the floor perhaps could not have been expected to be wholly free from oil, he was not as matter of law bound to anticipate and guard against

such slipperiness as would result from the quantities of oil escaping from a broken cup. The situation is quite different from that of a man entering in the dark a strange place. Whether in the dusk he could have seen the condition of the floor or should have procured more light before proceeding were under the circumstances properly left to the jury. *Hamilton v. Taylor*, 195 Mass. 68. It is to be remembered that he had come from the greater light of out of doors, and that his objective point was the valves, which were also outside the building and to be reached through a window.

2. It cannot be said as matter of law that the plaintiff assumed the risk of injury resulting from the oily floor. The doctrine of contractual assumption of risk does not apply, for the reason that the condition, both of the broken oil cup and the lubricated floor, had come into existence since his contract of employment. He did not in fact know of the danger which caused his injury. The workman can be barred of recovery for injuries resulting from perils arising during the course of employment only when he realizes their nature and extent with full comprehension of the danger, and continues in the service with the added exposure voluntarily and intelligently. *O'Toole v. Pruyn*, 201 Mass. 126.

3. Negligence of the Wonderland Company may well have been predicated upon its use for several days of a cracked and leaky oil cup under such circumstances that a large part of its contents continually flowed upon the floor of a passageway, where it was necessary or might become necessary for others than those in charge of the machinery to pass. Although the defendants Aldrich and Shea did not own the building or operate the machinery, yet it might have been found to have been a part of their work to regulate the flow of water down the chutes and to test the valves. In order to do this, it was necessary to go to the place where the plaintiff was injured. There was evidence tending to show that each of them knew of the leaking oil cup several days before the accident, and one of them had promised to remedy it. These circumstances may have been found to be enough to charge them with negligence in setting the plaintiff at work in a dangerous place of which he was ignorant without any warning. If they had no right to change the oil cup, they had knowledge of a danger and the duty to warn

rested on them. *Hagblom v. Winslow Brothers & Smith Co.* 198 Mass. 114. *La Fortune v. Jolly*, 167 Mass. 170. *Morena v. Winston*, 194 Mass. 378. *Crimmins v. Booth*, 202 Mass. 17. *Shannon v. Willard*, 201 Mass. 377, upon which the defendants rely, is distinguishable in that the slipperiness was there plainly obvious.

4. The principle that the cause of the injury is left a conjecture, as in *Childs v. American Express Co.* 197 Mass. 337, is invoked in behalf of all the defendants, because there is faint evidence that mud was tracked into the pump room from outside. But testimony to this effect was slight in itself, and most of the witnesses who described the surface of the floor where the plaintiff fell made no mention of anything aside from the oil. The decided weight of evidence pointed to that as the cause of his injury.

5. It is urged that there was no evidence of a copartnership between the defendants Aldrich and Shea. It was not questioned that a person or persons doing business as the Aldrich and Shea Construction Company had a contract for doing the work, upon which the plaintiff was engaged. Both Aldrich and Shea were upon the premises every day, and the former had referred to the latter as his partner. This statement standing alone was evidence only against the one who made it. *Rosseau v. Deschenes*, 203 Mass. 261. Shea hired men, gave directions indicative of a master's power, and when notified of the defective oil cup "said he would have it seen to." Several witnesses in testifying referred without objection to "Aldrich & Shea" as a firm. Though this may not have been competent evidence, yet, being in, it was entitled to its probative force. *Hubbard v. Allyn*, 200 Mass. 166, 171. A printed letter head used by Aldrich bore the names of both Shea and Aldrich. These circumstances taken together were sufficient to support a finding of a copartnership. *Smith v. Paul Boyton Co.* 176 Mass. 217. *Norris v. Anthony*, 193 Mass. 225. *Rosseau v. Deschenes*, 203 Mass. 261. *Case v. Baldwin*, 136 Mass. 90. *McMurtrie v. Guiler*, 183 Mass. 451. *Gay v. Ray*, 189 Mass. 112. *Ashley v. Dowling*, 203 Mass. 311. *Sumner v. Gardiner*, 184 Mass. 433.

6. It is contended that the defendants cannot be held jointly liable. Wrongdoers acting independently, whose tortious con-

duct concurrently contributes to the injury of a person, may be held jointly liable. *Feneff v. Boston & Maine Railroad*, 196 Mass. 575, 581. *Lindenbaum v. New York, New Haven, & Hartford Railroad*, 197 Mass. 314, 318.

Exceptions to evidence have not been argued, and are treated as waived.

Exceptions overruled.

ASA S. HATHAWAY vs. CITY OF EVERETT.

Middlesex. January 19, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Municipal Corporations. Public Officers. Injury to Property by Persons riotously assembled.

A city is not liable to a person assaulted and robbed by police officers appointed by it.

A city is not liable in an action of tort to a person compelled to pay excessive taxes by reason of an assessment made fraudulently by its assessors.

To make a city liable in an action of tort for property destroyed or injured by persons riotously assembled, the action must be brought under R. L. c. 211, § 8.

TORT against the city of Everett for injuries to the plaintiff's person and damage to his property as the result of acts alleged to have been committed by the defendant's agents and servants. Writ dated March 9, 1908.

In the Superior Court the case came on to be tried before *Sanderson, J.*

After the formal opening of the case by the plaintiff, the judge asked the plaintiff to make an offer of proof of the facts he intended to show and upon which he relied to maintain his action. In compliance with the judge's request the plaintiff offered to show that on July 16, 1902, a riot took place in the city of Everett; that several persons were engaged in the riot; that there were some police officers engaged in the riot; that those who were engaged in the riot laid hands on the plaintiff and committed robbery from the plaintiff's person by taking from him all of his valuables, which consisted of certain certificates of stocks, his money, and the keys to his house and post office box.

The plaintiff also offered to prove that the assessors of the

city of Everett committed robbery and conspiracy against the plaintiff by making a false assessment of the plaintiff's waste land, and had levied and collected taxes upon and from the plaintiff's waste land by reason of the false and fraudulent assessment made by the assessors of the city of Everett. The plaintiff offered to show and contended that by reason of the collection of those taxes fraudulently assessed the defendant, having derived a benefit therefrom, was liable.

The judge ruled that, if the plaintiff should prove the facts as stated in his offer of proof as to the acts of the assessors of the defendant in respect to the assessment of the plaintiff's property and as to the officers' acts in respect to the alleged assault and riot, the defendant would not thereby become liable to the plaintiff in this action.

It is to be inferred that the judge ordered a verdict for the defendant, although this is not stated in the bill of exceptions. The plaintiff alleged exceptions.

A. S. Hathaway, pro se.

N. P. Brown, for the defendant, was not called upon.

BRALEY, J. If the plaintiff could have proved the allegations of his declaration, that his premises had been invaded and he had been assaulted and robbed by police officers of the defendant, and that his real estate through a conspiracy of its board of assessors had been excessively overvalued and he had been compelled to pay taxes fraudulently assessed, he would not have established a cause of action against the defendant. Policemen and assessors, when guilty of such wilful wrongdoing, do not act as servants of the city, although they may have been appointed or elected by it, but as public officers, for whose tortious acts the municipality, upon the facts stated in the opening, would not be responsible. *Thayer v. Boston*, 19 Pick. 511. *Buttrick v. Lowell*, 1 Allen, 172. *Johnson v. Somerville*, 195 Mass. 370. *Smith v. Gloucester*, 201 Mass. 329. *Alger v. Easton*, 119 Mass. 77.

The plaintiff also contended that the defendant was liable in an action of tort for injury to his property caused by persons riotously assembled. But as the declaration contained no count under R. L. c. 211, § 8, the verdict for the defendant was rightly ordered.

Exceptions overruled.

JAMES L. DONOVAN vs. CHASE-SHAWMUT COMPANY.

Suffolk. January 19, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Employer's liability. Witness, Cross-examination.

If an inexperienced boy sixteen years of age is put at work upon a press for cutting narrow strips of copper, called wire, and the knife which cuts the wire is started by pressing a treadle, but the machine is out of order so that the knife sometimes comes down two or more times when the treadle has been pressed only once, and sometimes comes down without any pressure at all, and the boy sees this happen, but, being ignorant of machines, does not know whether the press is out of order or not, and if the reel from which the wire is fed into the cutting press requires constant attention to prevent the wire from spreading out and sometimes gets stuck so that the operator has to take hold of the wire and pull it, and if this boy, having been given no warning of danger, after he has worked upon the cutting press less than three hours, of which the first two hours were at night on the day before the accident, takes hold of the wire to pull it because the reel has stuck, and his hand slips off the wire and comes under the knife of the press just as it is descending automatically without the boy having pushed the treadle, in an action by the boy against his employer for his injuries thus caused, it cannot be ruled as matter of law that this was an accident of which the plaintiff accepted the risk by continuing at the work, and, assuming that there is evidence of negligence on the part of the defendant, he is entitled to go to the jury, his knowledge that on some previous occasions the knife which caused his injuries had come down without pressure on the treadle not being decisive against his recovery, because appreciation of the significance of the event as well as knowledge of it is necessary to charge him with assumption of the risk.

In an action for personal injuries, which were received while the plaintiff was in the defendant's employ more than six years before the time of the trial and when the plaintiff was an inexperienced boy sixteen years of age, if certain answers of the plaintiff upon his cross-examination, when separated from his other testimony, appear to indicate a comprehension on his part of the danger which he incurred in the defendant's employ, but some of the defendant's questions were so phrased as to appear to refer to the time of the trial, others were ambiguous in this regard, and still others by trifling changes referred to the time of the accident, it is proper for the jury to consider whether the plaintiff's expressions apparently manifesting appreciation of the danger were intelligent assertions of a knowledge possessed at the time of the injury or were the result of an acute cross-examination addressed to a wearied or confused intellect and eliciting acquiescence by skillfully framed questions.

To set an inexperienced boy sixteen years of age at work upon a machine press used for cutting narrow strips of copper by a knife, which when the machine is in order comes down only upon the pressing of a treadle, but which at the time that the boy is put at work also comes down without such pressure, and to furnish the boy with a reel from which the strips of copper are fed into the cutting press which is defective and frequently gets stuck so that the operator

has to pull the strip of copper with his hand, and to give the boy no warning of the dangerous character of his employment, although the defects in both the press and the reel have existed during a period of two months and the employer frequently has been notified of their existence, is evidence of negligence toward the boy on the part of his employer in an action brought by the boy against the employer for having his fingers cut off by the knife coming down automatically, when the boy's hand had slipped from the strip of copper in pulling at it, because the reel had stuck, and was directly under the knife.

TORT at common law by James L. Donovan, a minor, by his father and next friend Michael Donovan, for personal injuries received by the plaintiff on May 19, 1903, while in the employ of the defendant. Writ dated March 14, 1906.

In the Superior Court the case was tried before *Brown, J.*

At the time of the accident, the plaintiff was operating a machine known as a "Perkins Press" used for cutting off pieces from what is variously referred to in the evidence as "bond wire" or "bond strips."

The machine was operated by means of a treadle which when pressed down would cause a knife to descend and cut the wire or strips at the desired length.

The roll of "wire" was on a portable reel standing on the floor a foot or so from the machine, immediately to the right of the operator, and was not connected with the machine itself. The "wire" was merely a narrow strip of copper very thin and about one quarter of an inch wide. There was upon the machine just at the right of the knife a slot through which the "wire" passed, just large enough to allow it to pass through; this slot was about four inches long and was at right angles with the blade of the knife. To the left of the knife and on the same elevation as the slot there was a small table surface along which the wire passed to a gauge which would stop the wire, enabling the operator to cut it off at the desired length.

After there was an accumulation of about twenty of the wires they would work off the table automatically and sometimes would be pushed off by the operator into a basket or receptacle placed in position for that purpose.

The plaintiff testified that he was sixteen years of age at the time of the accident on May 19, 1903; that he first went to work for the defendant on May 12, 1903; that he had never worked

anywhere before and had left school about one week before he went to work.

About eight o'clock on May 18, the foreman in charge set the plaintiff at work first on another machine for five minutes, and then brought him into the machine shop and set him at work at the "Perkins Press," the cutting machine by which he was hurt. The plaintiff continued: "He took me out and he brought a young fellow out with him to show me how to work the machine; and he left then and went back into the other room. This young fellow sat down for about four or five minutes and cut off and just showed me and said: 'I guess you know how to do it all right'; so I sat down and worked, I guess until ten o'clock that night."

He explained the nature of the work: "It was cutting strips. There is a roll of copper about six inches in circumference, or more—I don't know which—about that big. And it is put on to a reel, with two pieces of wood about as big as pie plates. It is put on to a reel—on to a little pivot, and turns around—put on to what they call a reel, and it starts here. It is put about two feet away from the machine. You take the copper strip, about a sixteenth of an inch thick and quarter of an inch wide, and have to keep pressing it through the machine until it goes so far, and then cut it off by putting your foot down. Sometimes it comes off the reel and crumples up, and then you have to put it on the top and cut off the piece, and start it back and put it through the slot again."

He testified that the reel was all wood about two feet off the floor and movable. "You could move it any place. The machine was about as high as the witness stand and you could sit down while working. The strips were cut by a die. As you put your foot on the lever and pressed it down, down would come the die and cut it off," and the die would "shoot back again when you took your foot off." He testified that he worked until ten o'clock that night and used up about four rolls of wire; that he came back to work the next morning about 7.30 and worked on the same cutting machine for about three quarters of an hour when the accident happened; that there was a peculiarity about this machine that "when you pressed your foot on the lever it would come down two or three times sometimes;

and that sometimes it would start to work without your foot on it at all, it would come down."

"Q. Did you notice that sometimes the night before? A. I did. But I didn't know whether it was out of order or not. I didn't know anything about machines. — Q. Did anybody ever tell you about this coming down without your putting your foot on the treadle? A. No, sir. — Q. Were you ever given any caution or warning about it? A. No, sir. — Q. Did Mr. Malin [the foreman] say anything at all to you about that machine? A. No, sir. — Q. Did the boy? A. No, sir. — Q. Now, won't you please state just how the accident happened? A. I was working about three quarters of an hour that morning; I was cutting off and it came off the roll and crumpled up and I was told the night before when it got crumpled up to put it over the top. So I was putting it on the top and was pushing it off and the knife came down and cut my fingers off. — Q. Did you have your foot on the treadle? A. No, sir. — Q. Now, was there any trouble that time with the reel? A. Oh yes, the reel got stuck. That is what caused it. — Q. Now, won't you please state what was the consequence when the reel got stuck and what made it stick? A. There is two round pieces of wood that spread out and that caused the reel to open up. After that begins you have to get up and put a washer in it. That will make it tighter. It would get loose every hour or two; so you would have to put the washer on all the time so that this copper wire would not spread out. — Q. Did you call anybody's attention to that? A. No, sir. — Q. Now, was that the condition of the reel at the time that you got caught? A. Yes, it got stuck."

There was evidence that for a period of two months before the time of the accident both the press and the reel were frequently out of order, and that this was reported to the defendant's foreman, but that no repairs were made either upon the press or the reel.

Other evidence is described in the opinion. At the close of the plaintiff's evidence, the judge at the request of the defendant ruled that the evidence was not sufficient to support the case, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. A. McGeough, for the plaintiff.

M. O. Garner, for the defendant.

RUGG, J. The plaintiff was sixteen years old at the time of his injury. In an action growing out of the same injury the plaintiff's father was permitted to hold a verdict in his favor. *Donovan v. Chase-Shawmut Co.* 201 Mass. 857. The plaintiff was unfamiliar with machinery until he entered the employ of the defendant about a week before receiving the injury, and had worked upon the press less than two hours the night before, and about three quarters of an hour on the morning of the accident. The machine was designed to be started by a treadle, but it would start and repeat sometimes when the treadle was not used.

The question of the plaintiff's due care was for the jury. He was young and inexperienced. He was put at work without warning on a machine, which by reason of automatic starting may have been found to have been defective. *Rudberg v. Bowden Felting Co.* 188 Mass. 365. *Boyd v. Taylor*, 195 Mass. 272; *S. C.* 202 Mass. 213.

The danger of automatic starting could not have been discovered by an ordinary person on inspection. It was therefore not assumed by the contract of employment, and the duty was cast upon the defendant to give such warning and instructions as would enable the plaintiff to comprehend the peril he would encounter in the course of his service. *Ryan v. Fall River Iron Works*, 200 Mass. 188. *Crimmins v. Booth*, 202 Mass. 17.

The defendant strongly contends that upon the record now before us it appears that the plaintiff fully understood and appreciated all the risk he encountered, and that as he continued in the employment without compulsion or exigency he cannot recover. *O'Toole v. Pruyn*, 201 Mass. 126. No warnings whatever were given to the plaintiff as to the repeating or starting from a state of rest by the machine. He testified that the machine was not a simple one to him, that it had repeated, (that is, the knife on it had come down two or more times when the treadle was pressed only once,) five or six times on the night before, and twice in the morning, and that, on the night before, it had come down once or twice without pressure on the treadle, that the reel from which the copper wire was fed into the cutting press was so constructed that it required constant attention to prevent the copper from spreading out, and that sometimes the

reel stuck so that he had to take hold of the wire and pull it. The reel stuck, the plaintiff took hold of the wire to pull it, his hand slipped off and came under the knife of the press just as it descended of its own motion without pressure on the treadle, and he was injured. It does not appear that his hold on the copper wire had slipped at any time before, when the reel had stuck. He further testified that he realized that if his hand slipped while pulling the wire and the knife of the press came down, his hand would be cut and his hand might slip if he pulled on the wire while the reel stuck. Knowledge that on some previous occasion the event had happened, which caused the injury, is not decisive against recovery. There must be appreciation of the significance of the event as well as knowledge. *Arnold v. Harrington Cutlery Co.* 189 Mass. 547, 550.

Accent upon a part of the plaintiff's testimony to the exclusion of the rest indicates a comprehension of the danger he incurred, but the answers relied upon as decisive against the plaintiff came on a cross-examination, in which some of the questions were so phrased as to appear to refer to the time of the trial, others were in this regard ambiguous, and still others, by a trifling change, referred to the time of the accident six or seven years before. Under such circumstances, whether the plaintiff's expressions apparently manifesting appreciation of danger were intelligent assertions of a knowledge possessed at the time of the injury or the result of acute cross-examination directed to a wearied or confused intellect and eliciting acquiescence to skilfully framed questions was a proper subject for consideration by the jury. *Doolan v. Pocasset Manuf. Co.* 200 Mass. 200, 203. *Picquett v. Wellington-Wild Coal Co.* 200 Mass. 470.

The plaintiff suffered harm from the concurrence of a badly operating reel and an automatically starting press, both of which point to a failure of duty on the part of the defendant, in combination with the slipping of the hand in the performance of his duty, and all occurring in an experience upon the machines of less than three hours, two of which were at night, and without any warning having been given him as to the dangerous character of the employment. That under these circumstances and within so brief a time an inexperienced lad of sixteen, such as

the plaintiff was, unaided by anything save his own observation, worked out in his mind an understanding comprehension of the dangers under which he labored and determined voluntarily to continue at his task, could not have been ruled as matter of law. *Halley v. Nashua River Paper Co.* 202 Mass. 164. *Lynch v. Lynn Box Co.* 200 Mass. 340. *Packer v. Thomson-Houston Electric Co.* 175 Mass. 496. *Moylon v. D. S. McDonald Co.* 188 Mass. 499.

There was sufficient evidence to require a submission to the jury of the defendant's negligence. This point is disposed of by *Donovan v. Chase-Shawmut Co.* 201 Mass. 357.

Exceptions sustained.

ALBERT BERNARD vs. ADAMS EXPRESS COMPANY.

Suffolk. January 19, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Carrier, Of goods. Interstate Commerce.

The provision contained in § 20 of 24 U. S. Sts. at Large, c. 104, called the interstate commerce act, as amended by 34 U. S. Sts. at Large, c. 3591, § 7, that "no contract, receipt, rule, or regulation shall exempt" a common carrier receiving property for transportation from a point in one State to a point in another State from any liability imposed by the act, does not invalidate nor apply to an agreement contained in a receipt given in good faith by an express company to a shipper of goods and accepted by him with a complete understanding of its provisions, by which it is stipulated that unless a greater value is declared and is stated in the receipt the value of the goods shall be taken to be \$50.

In an action against a common carrier of goods engaged in carrying on an interstate express business, for the loss of a package of hides of the value of about \$150, which were delivered to the defendant for transportation from the plaintiff's tannery in the State of New Jersey to the plaintiff at his shop in Massachusetts, it appeared that the package was lost and that its loss was unexplained, that the contract of carriage contained in the receipt accepted by the plaintiff contained the following provision: "In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars unless a greater value is stated herein and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated therein." It further appeared that the package was delivered by the plaintiff to the defendant without

any statement of its value or of its contents, although the agent of the defendant asked whether any value was to be declared, that the methods and precautions used by the defendant for carrying and delivering the package safely were based upon the plaintiff's agreement that its value did not exceed \$50, and that, if the value of the package had been given, an additional charge would have been made for transportation and additional precautions would have been taken against loss. Section 20 of 24 U. S. Stats. at Large, c. 104, called the interstate commerce act, as amended by 34 U. S. Stats. at Large, c. 3591, § 7, provides as follows: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." The defendant admitted its liability for \$50 and paid the money into court, and the only question was whether the plaintiff could recover for the value of the package in excess of that sum. *Held*, that the agreement of the parties, contained in the receipt accepted by the plaintiff, as to the value of the package in the absence of a declaration, was not a contract or receipt exempting a common carrier from liability within the meaning of the provision of the interstate commerce act above quoted, and, being a contract deliberately entered into by both parties in good faith, was binding upon both, so that the plaintiff could recover nothing in excess of the sum of \$50.

KNOWLTON, C. J. This is an action to recover for the loss of a package delivered to the defendant, a common carrier, for transportation from the plaintiff's tannery at Newark in the State of New Jersey to the plaintiff at his shop at Montello in Massachusetts. The package contained hides whose value was \$154.80, and the only question is whether the plaintiff can recover that sum or only \$50. The case was tried before a judge of the Superior Court* without a jury. A book containing blank receipts, to be filled out and signed by the defendant's agent when goods were received for transportation, had been furnished to the plaintiff, and when this package was delivered, the plaintiff's agent, who was in charge of his office and shipping room, filled in the blank with a description of the bundle and its address. In the column headed

* *Hardy, J.* He found that the defendant's plea of tender was sustained, and found for the plaintiff in the sum of \$50.75. The plaintiff alleged exceptions.

"Value" the words "Not gvn." had been written by the defendant's teamster when he took a previous shipment. The receipt was signed for the defendant by its employee. At the head of the receipt is this statement: "The Company's charge is based upon the value of the property, which must be declared by the shipper." One of the provisions of the contract embodied in the receipt is as follows: "In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the Company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein." From evidence introduced at the trial the judge made the following findings:

"1. The method of carriage by the defendant varied with the value of the goods received for carriage.

"2. The rates of carriage by the defendant were reasonably proportioned to the value of the goods to be carried and packages of a greater value than fifty dollars were then and a long time prior thereto carried by the defendant in a manner and with precautions for caring for them which differed from and were more costly to the defendant than the manner and the precautions then and theretofore established, adopted and used by the defendant for packages of a value not exceeding fifty dollars."

"4. The bundle in question was delivered by the plaintiff to the defendant without any statement of its value or contents in the said receipt and agreement, although the agent of the defendant asked if there was any value.

"5. The defendant was not further informed of the value or contents of the bundle, and there was no indication on the outside of what its contents were, if any, or of its value.

"6. The defendant at the time of receiving the bundle was ignorant of its contents and of its value and has remained ignorant of its contents and of its value to the present time.

"7. The bundle was received by the defendant to be carried and delivered only under and upon the terms of the receipt and agreement.

"8. The defendant received the bundle in the belief that the value of the bundle was not more than fifty dollars.

"9. The methods and precautions adopted by the defendant for safely carrying and delivering the said bundle were based upon the plaintiff's agreement that the value of the bundle did not exceed the sum of fifty dollars.

"10. The defendant, before the plaintiff sued out his writ, tendered to the plaintiff the sum of fifty dollars and seventy-five cents, and has brought the same into court for the plaintiff."

"12. The plaintiff, for a long time prior to the delivery of the said bundle, had delivered merchandise under exactly the same conditions as was delivered the bundle in question.

"13. The plaintiff, at the time of the delivery of the said bundle and for a long time prior thereto, was familiar with the terms and conditions contained in the bill of lading or shipping receipt which was given to the plaintiff by the agent of the defendant.

"14. The receipt was prepared by an agent of the plaintiff, and was handed to the agent of the defendant for signature at the time of the delivery of the bundle.

"15. The plaintiff assented to the limitations of the defendant's liability contained in the receipt."

While the package was in the defendant's possession it was lost, and no explanation of its loss has been offered. The judge found for the plaintiff for the sum of \$50.75. The plaintiff made different requests for rulings to the effect that, under the Carmack amendment in the Hepburn act, so called, (24 U. S. Sts. at Large, c. 104, § 20; 34 U. S. Sts. at Large, c. 3591, § 7, pages 593, 595,) he was entitled to recover the full value of the property.

The statute provides "that any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such com-

mon carrier, railroad, or transportation company from the liability hereby imposed."

Under the decisions in this Commonwealth, and in the Supreme Court of the United States, there is no doubt that, before the enactment of this law, the plaintiff, upon the facts and findings in the present case, would be estopped from claiming more than \$50 as the value of the package. *Graves v. Lake Shore & Michigan Southern Railroad*, 137 Mass. 33. *Hill v. Boston, Hoosac Tunnel, & Western Railroad*, 144 Mass. 284. *Cox v. Central Vermont Railway*, 170 Mass. 129, 136. *Graves v. Adams Express Co.* 176 Mass. 280. *Hart v. Pennsylvania Railroad*, 112 U. S. 331. These decisions are founded on the common law, as it is interpreted in this Commonwealth, in the federal courts, and in the courts of many of the States. The question is whether the statute quoted above has changed the law in its application to the facts before us.

One obvious purpose of Congress was to extend the provisions of the common law so as to make a common carrier receiving property for transportation liable for loss, damage or injury to it, not only while it is in transit over his own lines, but while it is in the hands of a connecting carrier. In *Greenwald v. Weir*, 130 App. Div. (N. Y.) 696, it is said that this last is the only liability imposed by the statute. Although the liability stated is made statutory by the enactment, the statement of it, in the words "for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass," includes nothing beyond the liability at common law, except that for the undertaking of other carriers into whose possession the property may come. The liability is only for loss, damage or injury "caused" by the carrier, which, broadly interpreted, includes that resulting from neglect as well as that due to a positive act. It does not include the liability as an insurer against loss for which the common carrier is not culpably chargeable. The liability stated is for every kind of positive misconduct of the carrier affecting the property, and for negligence from lack of care or effort. Now what is the prohibition imposed upon the carrier by the statute? It is from exempting one's self from this liability by a contract, re-

cept, rule or regulation. In other words, we have a statutory declaration that a contract of exemption from liability for negligence is against public policy and void. This is no more than the courts have frequently declared in proceedings at common law.

But such a contract as we are considering in this case is not an exemption from liability for negligence in the management of property, within the meaning of the statute. It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care and management of that which is entrusted to him. It is to describe and define the subject matter of the contract, so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty as a carrier. It is not in any proper sense a contract exempting him from liability for the loss, damage or injury to the property, as the shipper describes it in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service and for the risk of loss which the carrier assumes. The principle was clearly pointed out in *Graves v. Lake Shore & Michigan Southern Railroad*, 137 Mass. 33. The cases cited above do not go upon the ground that there is a contract of exemption from liability for negligence, but upon the ground that the contract relates directly to the elements and quality, as to value, of that which is to be transported.

In *Hart v. Pennsylvania Railroad*, 112 U. S. 331, 340, the court said: "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the

shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." At the close of the opinion, on page 343, is this statement: "The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Squire v. New York Central Railroad*, 98 Mass. 239, 245."

An estoppel, founded on the agreements of the parties as to the nature or value of the property, is not an exemption from the liability recognized by the common law and affirmed in this statute as resulting from the ordinary undertaking of a carrier to transport property. The decision in *Greenwald v. Weir*, 130 App. Div. (N. Y.) 696, is to this effect. A very elaborate discussion of the law, with a citation of many authorities, by the Interstate Commerce Commission, is found in *In re Released Rates*, 13 I. C. C. Rep. 550, which reaches the same result. Upon the general doctrine, apart from this statute, see *Alair v. Northern Pacific Railroad*, 53 Minn. 160; 19 L. R. A. 764; *Barnes v. Long Island Railroad*, 115 App. Div. (N. Y.) 44, affirmed in 191 N. Y. 528; *Rosenthal v. Weir*, 170 N. Y. 148.

The decisions in *Kansas City Southern Railroad v. Carl*, 91 Ark. 97, and *Louisville & Nashville Railroad v. Warfield*, 6 Ga. App. 550, do not seem important in their application to the facts of the present case.

The findings of the judge, which were well warranted by the evidence, established the proposition that the provisions of the contract as to the value were entered into in good faith by the parties, and were not an attempt of the defendant to obtain

an exemption from liability for negligence, in evasion of the statute. It appeared that, if the value of the package had been given, an additional charge would have been made for transportation, and additional precautions would have been taken against loss, by having the package "handled under a signature passed by every man who handled the shipment from the time it was accepted until it was delivered, . . . so that there would have been a constant supervision of it."

Exceptions overruled.

L. M. Friedman, (F. J. Sulloway with him,) for the plaintiff.
J. L. Hall, for the defendant.

LOUISA W. ROGERS vs. BOSTON CLUB & another.

Suffolk. January 20, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Equity Jurisdiction, For appointment of receiver of insolvent corporation organized under R. L. c. 125, Remedy at law, Multiplicity of suits. *Corporation*, Organized under R. L. c. 125 as social club, By-laws. *Receiver*. *Equity Pleading and Practice*, Appeal.

Upon the averments of a bill in equity, it here was assumed upon demurrer, that, because the provisions of R. L. c. 163, §§ 143-149, relating to proceedings in insolvency by and against insolvent corporations, are suspended by the bankruptcy law of the United States, and because § 4 (b) of the bankruptcy act of 1898 does not include among the corporations which may become bankrupts under that act a corporation organized under R. L. c. 125 as a social club, a suit in equity may be maintained by a judgment creditor of such a corporation so organized, which has become insolvent, for the benefit of himself and other creditors, for the appointment of a receiver to collect all the assets of the corporation and all moneys due to it from its members.

In a suit in equity for the appointment of a receiver of the property of an insolvent corporation organized as a social club under R. L. c. 125, a receiver was appointed by the court and was directed to collect all the assets of the corporation and all moneys due to it from its members. The receiver filed two petitions in the suit in equity, one for the collection of the regular assessments due from the members and of the debts due from them to the club for food and refreshments, and the other for the collection of a special assessment made under a by-law of the club by its executive committee. Upon the first petition an order was made that service of process should be made upon twelve respondents designated as representatives of a class consisting of the three hundred and forty-three members of the club. A final decree was entered against the twelve designated respondents, ordering the payment of the sums of money found to be due from them respectively. From this decree the respondents appealed.

Upon the second petition a decree was entered dismissing the petition. From this decree the receiver appealed. A question being raised whether these appeals were ripe for hearing by this court or whether they must await a final decree in the receivership suit ordering a distribution of the property of the corporation among its creditors, it was *held*, that the appeal from the decree upon the receiver's first petition plainly was ripe for hearing, because the rights of the appealing respondents could not be protected if the hearing was postponed to any later time, and that the appeal of the receiver from the disallowance of his claims founded on the special assessment comprised such substantive elements in the litigation that under the special circumstances of the case that appeal well might be heard with the others.

A receiver of the property of an insolvent corporation, organized under R. L. c. 125 as a social club, who had been appointed in a suit in equity brought by a judgment creditor for the benefit of himself and other creditors against the corporation, and who had been directed by the court to collect all the assets of the corporation and all moneys due to it from its members, filed a petition in the suit in equity, upon which process was ordered to be served on twelve respondents designated as representatives of a class consisting of three hundred and forty-three members of the club, to collect assessments due from all the members under a by-law of the corporation and also debts due from many of the members for food and other refreshments. *Held*, that the petition could not be maintained, and that the receiver's remedy was at law, the remedy at law not being inadequate by reason of the multiplicity of the actions required to be brought, because such multiplicity was necessary to accomplish the ends of justice on account of the divers interests of the several respondents. *It was intimated*, that the same conclusion might have been reached, even if the receiver had confined his petition to the claims for annual dues against all the different members of the corporation, and had not included the claims against a large number of the members for food and refreshments, which had no more in common than the bills of any one tradesman against his customers.

A by-law of a corporation, organized under R. L. c. 125 as a social club, provided that an assessment upon the members might be made by a majority of the executive committee. The executive committee consisted of twenty members, fifteen of whom were chosen specially and five of whom were members *ex-officio* as officers of the club. A by-law, other than that authorizing the assessment, provided that five members of the executive committee should constitute a quorum. A vote imposing a special assessment on the members of the club was passed at a meeting of the executive committee when a quorum was present and was voted for by a majority of those present which was not a majority of the whole committee. *Held*, that the attempted assessment was invalid, the power to impose such an assessment being given to a majority of the whole committee and not to a majority of a quorum of five.

KNOWLTON, C. J. The Boston Club, a corporation organized under the R. L. c. 125, for social and other kindred purposes, became deeply indebted to many persons. It had small assets, and it made a voluntary assignment for the benefit of its creditors. Subsequently this bill in equity was brought in behalf of a judgment creditor for the benefit of herself and other creditors, against the corporation and the assignee, praying that a receiver

might be appointed to collect and receive from the assignee and from all other persons, including the members of the corporation, all the corporation's assets, and to distribute them ratably among all such creditors as should prove their debts before the court, and to dispose of any balance, if any there should be, in such manner as the court should direct.

Inasmuch as the statutes of this Commonwealth relative to proceedings in insolvency by or against insolvent corporations (R. L. c. 163, §§ 143-149) are suspended by the bankrupt law of the United States, and as this class of corporations is not included in those whose estates may be settled under this law (bankruptcy act of 1898, § 4 (b)), we may assume that, upon its averments, the plaintiff's bill was within the jurisdiction of the court. Upon this bill a receiver was appointed, who was directed to collect all the assets of the corporation and all moneys and debts due it from the members thereof.

The receiver filed a petition setting forth the names of all the alleged members of the Boston Club, more than three hundred in number, in which petition, as it was amended, he averred that these members were indebted to the club in the sum of \$25 each for the half of the annual dues to June 1, 1908, under a by-law of the club, and in the same sum, under the same by-law, for dues to December 1, 1908, and that forty-one of these alleged members were indebted to the club in various sums for ordinary charges for food and other refreshments which they had received, and praying that an account might be taken of the several amounts due from the several respondents, and for a decree requiring payment to the receiver of such sums as should be found due from each of them. Upon this petition there was an order of notice, the notice to be given by sending by mail a printed copy to counsel of record, and to twelve of the respondents "designated by the court upon whom service of this order shall be made in lieu of serving upon all the persons mentioned in this petition." After this service upon these designated persons most of them appeared and filed demurrers and answers to the petition. The demurrers having been overruled,* an appeal was taken to this court. Afterwards,

* In the Superior Court this suit was heard at all its stages by *Richardson, J.*, who made all the orders and decrees therein.

upon a hearing, there was an interlocutory decree, or order for a final decree, in which it was adjudged that, under the by-laws of the corporation, each resident member was bound to pay an annual assessment of \$50, and each non-resident member an annual assessment of \$25; that these designated respondents and other respondents, three hundred and forty-three in all, were members of the club who had neglected and refused to pay the amount of this annual assessment for the half year ending December 1, 1908, although one hundred and fifty-three of them had paid the instalment for the half year ending June 1, 1908, and that forty-one members of the club, including six of these designated members, were indebted to the club in various stated sums for ordinary charges for food and other refreshments. It was also decreed that, to save expense of service of the petition upon all of the three hundred and forty-three members, the twelve respondents were designated as persons upon whom service of process should be made as representatives of a class; that the payment of the assessment was necessary in order that the indebtedness of the club might be paid and that the designated respondents, respectively, should pay to the receiver the amounts found due from each of them, as stated in the decree, being in part for the annual assessments, and in part for the charges for food and refreshments. Subsequently a final decree against these respondents was made, directing payment of these sums, and that executions should issue against them severally to enforce payment. From this decree an appeal was taken to this court.

A second petition, similar in form, was presented to the court, to recover the amount of a special assessment made under a by-law by the executive committee. Upon this petition, after similar proceedings, the judge found that the assessment was invalid because the by-law authorized it to be made only by a majority of the committee present at the time of making it, and a decree was entered dismissing the petition. From this decree the receiver appealed.

An appeal was also taken by some of the defendants from the decree of the court allowing claims against the corporation, and especially the claims of Shepard Norwell Company, Smith Patterson Company and McKinney and Waterbury Company.

A question has been raised as to whether these appeals are ripe for hearing, or whether they must await a final decree ordering distribution of the property of the corporation among the creditors. The decree for payment to the receiver by the members of the corporation and awarding execution against them purports to be a final decree, and it is in fact a final decree in the separate and independent proceeding to which it relates. Not only is payment decreed, but executions are ordered for the enforcement of payment. This appeal is plainly ripe for hearing. The rights of the appealing parties could not be protected if the hearing were postponed to any later time. For similar, although not quite so strong reasons, we are of opinion that the appeal of the receiver from the disallowance of his claims for special assessments should be heard at this time. The determination of the amount of the claims against the estate and the appeal from the allowance of certain claims should not await a decree for the final distribution of the assets. It is so far independent, and it comprises such substantive elements in the litigation, that in the peculiar circumstances of this case the appeal may well be heard now with the others.

The demurring respondents assigned six causes of demurrer, among which were want of equity, misjoinder of respondents and multifariousness. The first petition was to recover a large number of legal claims from debtors of the corporation. Upon the facts found by the judge, as appears in his order for a decree, the members of the corporation were indebted under a by-law of the corporation by which they had agreed to be bound. Many of them were also indebted for goods sold and delivered by the corporation. The case is quite unlike the summary proceedings which the receiver may take by application to the court to protect his right of possession to tangible property of a corporation which is transferred to him by the action of the court under his appointment. Such property is in the control of the court whose representative he is. The collection of a debt stands differently. *Smith v. Johnson*, 57 Ohio St. 486. *State Bank of New Brunswick v. First National Bank of Plainfield*, 7 Stew. 450. *Andrews v. Paschen*, 67 Wis. 413. *Wheaton v. Daily Telegraph Co.* 124 Fed. Rep. 61. *Horn v. Pere Marquette Railroad*, 151 Fed. Rep. 626, 629. As to these claims the receiver had no greater

rights than the corporation. The respondents were severally liable in an action of contract, each for the amount of his debt. Against each the receiver had a plain, adequate and complete remedy at law. The only question as to this last proposition is whether his remedy at law would be inadequate because separate actions would involve a multiplicity of suits. The only branch of jurisdiction in equity to which the receiver can appeal for the maintenance of his petition is that which is exercised to avoid a multiplicity of suits.

Upon this subject there have been a great many decisions, with considerable conflict among them. The subject is very ably and fully discussed, with a citation of a large number of cases, in *Pom. Eq. Jur.* (3d ed.) §§ 251 to 274. It seems now to be settled by a great weight of authority that jurisdiction may sometimes be exercised on behalf of a single party against a numerous body, although there is no common title nor community of right or interest in the subject matter among those individuals, and where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body. On the other hand, as was said by Mr. Justice Peckham, speaking for the court in *Hale v. Allinson*, 188 U. S. 56, 77, "The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff, and where the case is not covered by any controlling precedent the inconvenience might constitute good ground for denying jurisdiction." It seems too plain for doubt that the receiver's first petition in this case, which joined legal claims for annual dues against all the different members of the corporation, and included charges against a large number of them for food and refreshments, cannot be sustained on any principle of equity jurisprudence. As to these charges, there was no community of interest among the respondents in any question of law or fact involved,

or in the kind or form of relief demanded. The petition included claims for a large number of separate debts which had no relation to one another. They had no more in common than the bills of a grocer against the customers to whom he has sold goods. It follows that the decree overruling the demurrers and the final decree directing payment and awarding execution must be reversed.

A question of more difficulty, which was included in the appeal and has been argued by counsel, and which may arise again in subsequent proceedings in the case, is whether the claims against all the members for the annual dues can be joined in a petition in equity. Similar questions have been passed upon by the courts. A bill was brought by a receiver of a State banking corporation in Iowa, to recover from stockholders assessments levied to enforce a personal liability for debts under a law of that State. It was held that the suit could not be maintained, and that the remedy was at law. *Tompkins v. Craig*, 93 Fed. Rep. 885. In *Hale v. Allinson*, 102 Fed. Rep. 790, there was an attempt by a receiver to enforce in equity a personal liability imposed by statute upon stockholders in a corporation, and it was held that there was no jurisdiction in equity. Judge McPherson in giving the opinion said: "Two classes of questions remain to be decided: The first is whether a given stockholder was ever liable as such; and the second is whether, if he were originally liable, his liability has ceased, either in whole or in part. Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant. The receiver's cause of action against each defendant is, no doubt, similar to his cause of action against every other, but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defense, and defenses may vary so widely that no two controversies may be exactly or even nearly alike. If, as is sure to happen, differing defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits with little relation to each other, except that there is a common plaintiff, who has similar claims against many persons. But as each of these persons

became liable, if at all, by reason of a contract entered into by himself alone, with the making of which his co-defendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and not they, has done nothing to discharge the liability." This decree was affirmed in 106 Fed. Rep. 258, by the unanimous decision of the Circuit Court of Appeals, which adopted the opinion given in the Circuit Court. The same question arose under the same statute in *Hale v. Allinson*, 188 U. S. 56, 77, 78, and the same result was reached by the Supreme Court of the United States, which quoted at length from the opinion of Judge McPherson and adopted it as a statement of the law. In this case too, on page 78, Mr. Justice Peckham reaffirmed the rule stated in *Kennedy v. Gibson*, 8 Wall, 498, 505, and followed in *Bailey v. Tillinghast*, 99 Fed. Rep. 801, and in several other cases, as to the enforcement of the statutory liability of stockholders for debts in a national bank, that "Where the whole amount is sought to be recovered the proceedings must be at law. Where less is required the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution."

The considerations which led to the decision in *Hale v. Allinson*, apply with almost equal force to the present case. There is one question presented by the receiver in which the respondents all have a common interest, namely, whether there was a by-law and a liability of members under it, as he avers. There are other questions which pertain to each individual respondent, namely, whether he became a member of the corporation so as to be subject to the liabilities of members, and if so, whether he ceased to be a member before this particular liability attached, and whether, if it attached, it was ever discharged. In none of these questions has any other member any interest. As to them, there must be a separate trial against each respondent.

This is not a case in which a decree for payment can be made against a particular respondent without service upon him. As to questions of the kind above stated, he is not a member of a class who can be represented by other members. Before he can be found liable as for a debt, he must be given notice of the claim against him, and an opportunity to make his defense. In-

asmuch as there must be a service of process upon each defendant, it would seem to be a more simple and orderly method to bring an action at law against each member, and almost if not quite as economical a way for the receiver.

We are inclined to the view that this case should be governed by the decision above stated, and that it should be treated as presenting nothing but separate claims for the payment of debts in which different questions may arise, such that they cannot properly be joined in equity for the purpose of preventing a multiplicity of suits.

The respondents contend that there can be no liability for these annual dues, because a receiver has been appointed for the property of the corporation, and the respondents have not enjoyed the expected benefits of membership. From what appears upon this record, we must assume that the liability for the dues for the year ending December 1, 1908, accrued on December 1, 1907, and that nothing had occurred at that time to relieve the respondents from liability for this annual assessment. We have no report of evidence, nor anything on the subject but the pleadings and the decrees. Dealing with the case only upon the facts before us, we hold that this defense is not made out.

Nor is there any good ground for the appeal of the respondents as to the allowance of the claims of creditors against the corporation, including the claims of Shepard Norwell Company, Smith Patterson Company and McKinney and Waterbury Company. The decree as to these is founded upon findings of fact by the trial judge which are well sustained by the evidence.

The appeal of the receiver from the dismissal of the second petition rests upon the fact that a quorum of the executive committee were present when the special assessment was made, and the vote was passed by a majority of the quorum. The by-law under which action was taken provides that an assessment may be made by a majority of the executive committee. The committee consisted of twenty members, fifteen chosen specially, and five other officers who were members of the committee *ex officio*. By article 8, section 10, five members of the committee constitute a quorum. The question is whether the by-law

authorizing a special assessment to be made by a majority of the committee means by a majority of the quorum, or a majority of the whole committee. We are of opinion that the judge was right in holding that it means a majority of the whole committee. It gives an unusual and important power. It uses words which naturally signify more than half of the whole number of the committee. It is hardly to be expected that this power would be given to a majority of a quorum of five, which is so small a part of the whole committee.

Decree reversed ; demurrers sustained ; decree as to allowance of claims affirmed ; decree dismissing receiver's second petition affirmed.

H. W. Ogden, (W. A. Powers with him,) for members of the Boston Club.

W. B. Durant, for the receiver.

J. J. Feely, for creditors.

MARTIN MOONEY vs. BENJAMIN F. SMITH COMPANY.

Bristol. January 21, 1910. — February 24, 1910.

Present : KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

In an action under the employers' liability act for injuries received while in the employ of the defendant, from being struck by a plank, which had been held in place by a wire against a concrete wall in process of hardening and which fell upon the plaintiff when the wire was cut by a person alleged to be a superintendent of the defendant without giving the plaintiff any warning that the plank was about to fall, the defendant contended that there was no evidence warranting a finding that the person who cut the wire was entrusted by the defendant with superintendence within the meaning of the statute. This person was referred to in the testimony as the "boss carpenter," by witnesses who also from their daily observation of him described his principal work in the common employment as giving orders to the men. His wages were twenty cents per day more than those paid his fellows. He testified that his principal work was to tell the men under him, numbering ten or fifteen or more, what to do ; that he could change their work ; that when he was not satisfied with a man he could send him elsewhere ; that he did not labor at carpentering or only a very little, and that he "was not supposed to do any work" ; that his larger pay "was for bossing the men, looking after them that they done the work right, tell them what to do," that he did not hire or discharge men, but told another person who

discharged men on his request. *Held*, that this evidence was sufficient to support a finding that the person in question was a superintendent, "whose sole or principal duty was that of superintendence" within the meaning of the statute.

In an action under the employers' liability act for injuries received while in the employ of the defendant, from being struck by a plank, which had been held in place by a wire against a concrete wall in process of hardening and which fell upon the plaintiff when the wire was cut by a superintendent of the defendant without giving the plaintiff any warning that the plank was about to fall, there was evidence warranting a finding that the person who cut the wire was entrusted by the defendant with superintendence within the meaning of the statute, that the plaintiff with eight or ten other men was at work near the plank, that the superintendent had been examining the concrete wall to ascertain whether it was dry enough to take away the wires, that it had been the custom before cutting such wires to give a warning so that the men could get out of the way, and that this warning always had been given by the superintendent, and it might have been found that it was a part of his duty as superintendent to give it, that on this occasion he decided that the wall was hard enough for the wire to be cut, and, without looking to see whether any men were likely to be hurt and without giving any warning, he cut the wire himself, causing the plank to fall upon the plaintiff. The plaintiff and the others of the group of laborers with him were not within the range of vision of the superintendent when he cut the wire. It was admitted that the plaintiff was in the exercise of due care. *Held*, that the plaintiff was entitled to go to the jury, who could have found that the proximate cause of the plaintiff's injuries was not the manual act of cutting the wire, which the superintendent chose to do himself, but was the determination to cut the wire at that particular moment without giving any warning and without ascertaining whether a warning was necessary.

In an action under the employers' liability act for injuries received while in the employ of the defendant from being struck by a plank, which had been held in place by a wire against a concrete wall in process of hardening and which fell upon the plaintiff when the wire was cut by a superintendent of the defendant without giving the plaintiff any warning that the plank was about to fall, where there was evidence warranting a finding that the proximate cause of the plaintiff's injuries was the determination of the superintendent to cut the wire when he did without giving any warning and without ascertaining whether a warning was necessary, although he chose to cut the wire with his own hand instead of ordering a subordinate to cut it, the further fact appeared in evidence, that earlier in the day this superintendent had been directed by the general superintendent of the building to examine the wall and ascertain whether it was hard enough to allow the cutting of the supporting wires. *Held*, that the evidence in regard to the order of the general superintendent was immaterial, because this order, although given by a superior, was issued to one clothed with the powers of a superintendent, and left to him the exercise of his usual authority as to the way in which and the time when the wire cutting should be done.

TORT under the employers' liability act for personal injuries received on May 18, 1907, while in the employ of the defendant, a corporation. Writ dated August 18, 1907.

The declaration contained three counts, of which the first and second were waived by the plaintiff. The third count, on which the case was tried, alleged that the plaintiff's injuries were caused by reason of the negligence of some person in the service of the defendant who was entrusted with and was exercising superintendence, and whose sole or principal duty was that of superintendence.

In the Superior Court the case was tried before *Jenney, J.* The findings which were warranted by the evidence are stated in the opinion. At the close of the evidence the judge ruled that upon all the evidence the plaintiff could not recover and ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. W. Cummings, for the plaintiff.

D. F. Slade, for the defendant.

RUGG, J. This is an action of tort to recover for personal injuries. It has not been contended that the plaintiff was not in the exercise of due care. The points argued by the defendant are that one Moran in its employ was not a "superintendent, whose sole or principal duty was that of superintendence" within the meaning of these words in the employers' liability act, and that, if he was, his act, which caused the injury to the plaintiff, was not one of superintendence.

Moran was referred to as the "boss carpenter," by witnesses who also from their daily observation of him described his principal work in the common employment as giving orders to the men. His wages were twenty cents per day more than those paid his fellows. He testified that his principal work was to tell the men under him, numbering ten or fifteen or more, what to do; that he could change their work; that when he was not satisfied with a man he could send him elsewhere; that he did not labor at carpentering or only a very little, and that he "was not supposed to do any work"; that his larger pay "was for bossing the men, looking after them that they done the work right, tell them what to do," that he did not hire or discharge men, but told one McKinnan who discharged men on his request. This evidence was sufficient to support a finding that he was a statutory superintendent. *Robertson v. Hersey*, 198 Mass. 528. *Mattson*

v. *American Steel & Wire Co.* 200 Mass. 360. *Murphy v. New York, New Haven, & Hartford Railroad*, 187 Mass. 18.

The circumstances of the plaintiff's injury were these: A long plank supported and was kept upright by the pressure of a wire used to hold in place, while hardening, walls of a concrete building in process of construction by the defendant. The plaintiff, with eight or ten other men, was at work near this plank. The boss carpenter, Moran, was examining the concrete wall to ascertain whether it was dry enough to take away the wires. It had been the custom before cutting such wires to give a warning, so that the men could avoid the danger. Theretofore, this warning had always been given by Moran. On this occasion he decided that the wall was hard enough, so that the wire should be cut and, without looking to see whether men were likely to be hurt and without giving any warning, he cut the wire, whereby the plank fell upon the plaintiff. The plaintiff and his group of laborers were not within the range of vision of Moran at the time he gave and executed his own order to cut the wire. It might have been found, in view of the custom of Moran to give the warning on previous occasions, that this was a part of his duty as superintendent. *Cote v. Lawrence Manuf. Co.* 178 Mass. 295. The cutting of the wire was not his only act. It was preceded by a determination that with regard to the strength of the wall it ought to be cut, and that it should be cut at that particular moment without warning and without ascertaining whether warning was necessary. The line of demarcation between an act of superintendence and one of labor, when a single person in his main capacity of superintendent determines whether and when work shall be performed, and then as subsidiary to his chief employment also does some manual labor in execution of his order as superintendent, is sometimes difficult to define. One helpful, though perhaps not universal, test is to see where the proximate cause of the resulting injury would rest, if the superintendent had given his order to a subordinate, who had exactly obeyed the instructions. *Roche v. Lowell Bleachery*, 181 Mass. 480. In applying that test here, its incidence falls upon the direction to cut the wire without warning and not on the act of cutting.

The negligence was not in severing the wire, which was manual labor and properly done, but in giving the order to do it without first finding out whether injury was likely to result to fellow employees and in failing to give them warning, which was superintendence. It could not properly have been ruled as matter of law that the proximate cause of the injury to the plaintiff did not result from an act of superintendence by Moran. *O'Brien v. Look*, 171 Mass. 86, 41. *McPhee v. New England Structural Co.* 188 Mass. 141. *Hourigan v. Boston Elevated Railway*, 198 Mass. 495. *Coates v. Soley*, 194 Mass. 386. *Silvia v. New York, New Haven, & Hartford Railroad*, 203 Mass. 519. *Igo v. Boston Elevated Railway*, 204 Mass. 197.

This case is the converse of *Sarrisin v. Slater & Sons*, 203 Mass. 258, where the injury resulted from negligence in the performance of the act of manual labor by the superintendent. Upon this point the fact that Moran had been directed earlier in the morning by the general superintendent of the building to examine the wall and ascertain whether it was hard is an immaterial circumstance. This was an order by a superior, but it was issued to one clothed with the powers of a superintendent, who was left to exercise his usual authority as to the way in which and the time when the mere wire cutting should be done.

Exceptions sustained.

BENJAMIN V. PAGE vs. JOHN J. JOHNSTON, JR.

Suffolk. January 21, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Damages, In contract, Assessment by trial judge. *Practice*, Civil, Findings of trial judge.

In an action to recover damages for the alleged breach of an agreement in writing for the exchange of real estate, whereby, among other things, the defendant agreed to sell and the plaintiff, who was described as the party of the second part, agreed to buy "the new three family apartment house . . . shown to the party of the second part all completely finished and all rented, \$4-\$6-\$4 dollars per month," it appeared that in making the exchange under the contract this property at the request of the plaintiff was conveyed by the defendant to a

third person, and that later, when the plaintiff sold the property, it was conveyed by this third person to the purchaser. It further appeared that when the property was conveyed by the defendant two of the three apartments in the house were vacant, that one of these apartments the plaintiff never was able to let, up to the time he sold the property about four months after its purchase, and that the other vacant apartment remained unlet for three months, after which by incurring expense in employing a broker the plaintiff succeeded in letting it. *Held*, that the measure of damages was the difference between the value of the property in the condition in which it was represented by the contract to be and its value in its actual condition at the time of the delivery of the deeds under the contract, and that the fact that the deed of this property was made to another person at the plaintiff's request instead of to the plaintiff was immaterial; that the plaintiff was entitled to recover substantial damages, and that, upon the question of the value of the house when partly occupied as compared with its value when wholly occupied, all reasonable probabilities as to the length of the period which would elapse before the house would be wholly occupied and the probable loss of rents during that period properly might be considered. *Held*, also, that evidence as to the difficulty of procuring tenants and as to the loss incurred by the plaintiff in failing to procure them under the circumstances of the case might furnish the best standard for measuring the difference in value between the property as it was agreed by the defendant that it should be and as it actually was, and therefore properly might be considered.

Where a judge, before whom an action of contract is tried without a jury, finds for the plaintiff and assesses the damages in a certain sum without stating the rule which he adopted as to the measure of damages, it will be assumed that he proceeded upon the true rule.

CONTRACT for the alleged breach of an agreement in writing printed below. Writ dated February 15, 1909.

The agreement declared upon was as follows:

"Agreement made this 29th day of May, A. D. 1908, between John J. Johnston, jr., of Boston of the first part, and Benjamin V. Page of Brookline of the second part.

"The party of the first part hereby agrees to sell, and the party of the second part to purchase, a certain estate situated on Harvard Street and bounded as follows: Dorchester.

"Being the new three family apartment house nearest Talbot Ave. shown to party of the second part all completely finished and all rented, 34-36-34 dollars per month and pay the taxes of 1907 on the houses 58 Forest Street and 20 Langdon Street.

"Said premises are to be conveyed on or before 5th of June, 1908, by a good and sufficient deed of the party of the first part, conveying a good and clear title to the same free from all incumbrances except a first mortgage of \$6250 and in consideration for such deed and conveyance the party of the second part agrees

to convey by a good and sufficient deed to the party of the first part a certain estate situated 58 Forest Street and 20 Langdon Street, Roxbury, bounded as follows: Free from all incumbrances except a first mortgage of \$2200 on 20 Langdon Street and 58 Forest Street free and clear. Full possession of all said premises is to be delivered to the respective parties at the time of the delivery of the said deeds, the said premises to be then in the same condition in which they now are, reasonable use and wear of the buildings thereon alone excepted.

"The deeds are to be delivered and the consideration paid at the Registry of Deeds.

"In Witness Whereof the said parties hereto, and to another instrument of like tenor, set their hands and seals on the day and year first above written.

"John J. Johnston, Jr.
Benjamin V. Page."

The declaration was as follows :

"The plaintiff says that on or about May 29, A. D. 1908, he entered into a written agreement with the defendant, a copy of which is hereto annexed, and the plaintiff says that the house on Harvard Street in Dorchester exchanged by the defendant for property on Forest Street and Langdon Street in Roxbury as set out in said agreement was not in all respects completely finished and was not all rented at \$34, \$36 and \$34 per month as required by said agreement; but that apartments 1 and 2 in said house were not rented; and the plaintiff says that he made all reasonable efforts to let said apartments, but was not able to let apartment 2 during the months of July and August, 1908, and was not able to let apartment 1 at any time until said house was sold in November, 1908; and the plaintiff says that he suffered the loss of rents, to wit, \$72 for apartment 2 and \$136 for apartment 1, and the further sum of \$10 for securing a tenant for said apartment 2; and the plaintiff further says that he was obliged to make repairs to the value of \$6.55 on said house :

"Wherefore the plaintiff says that the defendant owes him said sum of \$224.55 as damages, with interest from November 1, 1908."

In the Superior Court the case was tried before *Raymond, J.*,

without a jury. It appeared that in pursuance of the agreement the defendant conveyed the Harvard Street property to one Joseph W. Murray, who by deed of June 6, 1908, conveyed it to Mrs. Page, the plaintiff's wife, but that the latter deed was never recorded; that Mrs. Page at the time of signing this agreement held the title to the Langdon Street property and Murray held the title to the Forest Street property; and that on June 5, 1908, they conveyed these two properties to the defendant. The defendant admitted signing the agreement with knowledge of the statement contained in it that the three apartments of the Harvard Street house all were rented at specified rents; he also admitted that the middle and lower apartments were not rented on May 29 or June 5, 1908.

The plaintiff testified that he never was able to let the lower apartment at any time up to November, 1908, when the Harvard Street property was sold by the plaintiff and was conveyed by Murray to the purchaser. The middle apartment was let in September, 1908, for \$35 a month and then was occupied continuously until the sale of the property in November. The plaintiff used every effort he could to rent these two apartments and employed a broker through whom the middle apartment was let. He paid the broker \$10 for his services.

At the close of the evidence the defendant asked the judge to make the following rulings:

"1. The plaintiff can recover only such damages as he has proved that he suffered personally.

"2. The plaintiff can recover only nominal damages.

"3. The plaintiff cannot recover in any event more than \$10.

"4. The plaintiff cannot recover in any event more than \$24.

"5. The plaintiff cannot recover anything for loss of rent.

"6. In any event the plaintiff cannot recover for more than one month's rent of the middle and lower suites.

"7. In any event the plaintiff cannot recover for more than two months' rent of the middle and lower suites.

"8. The plaintiff cannot recover anything for the work done and for which in all \$6.25 was paid."

The judge made the eighth ruling requested, and refused to make any of the others. He found for the plaintiff and as-

sessed damages in the sum of \$223.45. The defendant alleged exceptions.

G. R. Swasey, for the defendant.

W. R. Bigelow, for the plaintiff.

HAMMOND, J. The rule of damage was the excess of the value of the Harvard Street estate as it was represented to be over its value as it actually was, and to this excess the plaintiff was entitled immediately upon the delivery of the deeds passed under the agreement, irrespective of the question whether the deed was made to him or to some one at his request. *Morse v. Hutchins*, 102 Mass. 439, and cases there cited. The defendant could not relieve himself from the consequences of this rule by showing that the plaintiff had conveyed the property to some one else. Moreover the trial judge might have found upon the evidence that although the record title passed to Murray he held the property for the benefit of the plaintiff.

Upon the evidence it could not have been ruled as matter of law that applying the rule above stated the damage was merely nominal. A house filled with tenants may be an entirely different thing in value from a house only one third filled, and that may be so even if the tenants are simply tenants at will. A purchaser may be willing to take his chances as to whether tenants in a house already filled may leave, and not be willing to do so as to getting tenants for the unoccupied parts of a house only partly filled. The second, third, fourth, sixth and seventh requests were therefore properly refused.

The first and fifth requests present more difficulty. We understand the fifth request to be in substance that in estimating the damages no weight can be given to the loss of rent. As thus understood it could not have been given. Upon the question whether a house partly occupied is worth as much as a house wholly occupied, all reasonable probabilities as to the time when the house may be wholly occupied and the probable loss of rents during that time may be properly considered. The request was properly refused.

The first request was that the plaintiff could recover only such damages as he has proved that he suffered personally. If this request is to be understood as meaning that the plaintiff could recover only such damages as by the legal rule of damages he

suffered, of course it should have been given. But the request when interpreted in the light of the contention of the defendant is not to be understood in that sense. As one of the methods of arriving at his damages the plaintiff had introduced evidence of the trouble experienced in getting tenants for the unfilled portions of the house after the deed to Murray. In the cross-examination of the plaintiff it became apparent that it was the position of the defendant that even if there was a loss of rents that was a loss not suffered by the plaintiff personally, because he was not the owner, and that such loss therefore could not be taken into consideration in estimating the damages. As thus understood the first request could not have been given.

The case was tried before the judge without a jury. The declaration sets out certain losses as elements of damage, and it is argued by the defendant that it substantially appears by the finding that the judge has adopted these losses as showing conclusively, as matter of law, the real damage.

But the rule of damages adopted by the judge is not stated. The declaration was in law a declaration to recover damages generally for breach of the contract. The presumption is that the judge proceeded upon the true rule, namely, the difference between the property as represented and as it was. It may well be that the evidence as to the difficulty in procuring tenants and the loss incurred by a failure to procure them was the best standard under the circumstances of this case by which to measure that difference.

Exceptions overruled.

NEW ENGLAND TRUST COMPANY *vs.* HARRIET E. ABBOTT.
ATTORNEY GENERAL *vs.* NEW ENGLAND TRUST COMPANY.

Suffolk. January 24, 1910. — February 24, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Tax, On inheritances. Trust.

The provisions of a trust agreement under which a trustee received certain sums of money from a settlor were that the income was to be paid to a beneficiary as often as dividends became payable thereon, that at the end of five years the

settlor could withdraw the whole trust fund by giving the trustee a six month's notice in writing and that the trustee could pay off the trust fund by giving the settlor such notice, that if no such notice was given the fund should remain with the trustee for another period of five years, that, in the case of the death of the settlor before the termination of a period of five years during which the trust was in force, the principal and unpaid income were to be paid to the beneficiary in sixty days after the expiration of the current period of five years. The settlor died while the trust was in force, and by a bill in equity for instructions, brought by the trustee, and by an information filed by the Attorney General at the relation of the Treasurer and Receiver General, the question was raised whether the principal fund was subject to an inheritance tax under R. L. c. 15, § 1, as amended by Sta. 1905, c. 470; 1906, c. 438. *Held*, that the gift of the principal was "made or intended to take effect in possession or enjoyment after the death of the grantor," and therefore that an inheritance tax should be paid as of a date thirty days after the expiration of the current period of five years referred to in the trust agreement.

BILL IN EQUITY, filed on October 30, 1909, by the trustee under written agreements of trust which are described in the opinion, for instructions as to whether or not an inheritance tax should be paid upon a fund in its possession under the agreements; and

INFORMATION, filed on the same day by the Attorney General at the relation of the treasurer and receiver general, seeking that the trustee be ordered to pay the inheritance tax to the treasurer and receiver general.

The two cases were ordered to be heard together, and were reserved by *Hammond, J.*, upon the bills and answers for determination by the full court. The facts are stated in the opinion.

The cases were submitted on briefs.

D. Malone, Attorney General, & *F. T. Field*, Assistant Attorney General, for the plaintiff in the second case.

C. H. Tyler, O. D. Young & I. H. Ellis, for Harriet E. Abbott and the New England Trust Company.

KNOWLTON, C. J. These two cases present but a single question. On or about December 23, 1893, and on each of three days thereafter, one James C. Marshall, who died in January, 1907, domiciled in Boston, deposited with the New England Trust Company the sum of \$1,000, making \$4,000 in all, upon conditions set forth in certain agreements of trust. Under these agreements, which were all alike in their substantive provisions, the Trust Company was to pay the income as often as dividends thereon should become payable, to Harriet E. Abbott or her

order. At the expiration of five years from the date of the agreement, Marshall could withdraw the whole trust fund by giving the company written notice of his intention so to do six months before that time, and the company could pay off the trust fund if it chose, by giving him a like notice of its intention so to do. If no such notice was given by either party, the trust fund was to remain during another term of five years, and the right of withdrawing or paying off the principal sum might be exercised at intervals of five years from the date of the agreement. In case of the death of Marshall before the termination of the trust, or of any agreed extension thereof, the trust fund and any unpaid income was to become payable to Harriet E. Abbott in sixty days after the expiration of the period of five years, or any agreed extension thereof. The fund has remained in the possession of the Trust Company, Marshall has deceased, and the question is whether the Trust Company, before paying the principal to Miss Abbott, is to deduct from it any sum for a collateral inheritance tax under the provisions of the R. L. c. 15, § 1, as amended by the Sts. 1905, c. 470 and 1906, c. 436, and if so, what sum.

The only part of the property which was finally disposed of in a known and definitely stated way was the income for the period of five years. The disposition of the principal was left subject to contingencies, any one of three of which might terminate the trust and give direction to the payment of the principal. The creator of the trust, six months before the expiration of the five years, could give notice of his intention to withdraw the principal, or the Trust Company could give notice of its intention to pay it off, in either of which cases the money would be returned to Marshall; or, if Marshall survived and no notice was given, another period of five years would begin under the same arrangement; or if Marshall died before the expiration of the first period and no notice had been given, the trust would be terminated and the principal paid off to Miss Abbott at the end of sixty days from the expiration of the period.

She had a vested interest in the income until the termination of the trust. The arrangement in regard to the principal was very different. Her only interest in that was contingent, and she was not to enter into the possession and enjoyment of it, in

any event, until after the death of Marshall, and then only if the trust had not been terminated by either party by giving notice in his lifetime.

The question under the statute is whether this gift of the property was "made or intended to take effect in possession or enjoyment after the death of the grantor." We think it plain that it was. Miss Abbott could have no possession or enjoyment of the principal until after his death. The fact that she had the possession and enjoyment of the income in his lifetime makes no difference. In that respect the case is the same as if this income had been given to another person, with the disposition of the principal that appears in the agreement. The income and principal stood each by itself, with a separate provision for the disposition of each, and they were as independent of each other as if the income had been given to a third person. The cases are within the principal on which *Crocker v. Shaw*, 174 Mass. 266, was decided, and similar decisions under similar statutes have been made in other States. *People v. Kelley*, 218 Ill. 509. *Matter of Green*, 153 N. Y. 223. *Matter of Bostwick*, 160 N. Y. 489. *Matter of Brandreth*, 169 N. Y. 437. *Wright's appeal*, 38 Penn. St. 507. *Reish v. Commonwealth*, 106 Penn. St. 521. *Seibert's appeal*, 110 Penn. St. 329. *Dubois' appeal*, 121 Penn. St. 368. *Line's estate*, 155 Penn. St. 378.

The property is subject to a collateral inheritance tax, to be assessed as of a time thirty days after the expiration of the period of five years referred to in the agreement, and interest is to be paid upon the tax from that time. In the bill of the New England Trust Company the plaintiff is to be instructed accordingly. In the information by the Attorney General the defendant is to be ordered to make payment of the tax and interest to the treasurer and receiver general.

So ordered.

RICHARD COLFORD vs. NEW ENGLAND STRUCTURAL
COMPANY.

Suffolk. January 11, 1910. — February 25, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability.

It is proper for the judge presiding at the trial of an action of tort by an employee of a corporation, engaged in constructing a steel bridge over the tracks of a railroad, against his employer to recover for injuries caused by a temporary staging, upon which the plaintiff was working, being struck by a locomotive engine passing on the railroad, the declaration in which contained two counts at common law, one alleging as the cause of the injury a failure to warn the plaintiff of the approach of the locomotive engine and the other alleging as the cause the negligent placing of the plaintiff at work in a dangerous place without taking proper precautions for his safety, and also contained counts under R. L. c. 106, § 71, cl. 2, alleging as the cause of the injury negligence of a superintendent of the defendant, to rule that the plaintiff cannot recover, if on the view of the testimony most favorable to the plaintiff it appears that the plaintiff and certain of his fellow workmen constructed the temporary staging, that at the time the plaintiff knew that if it was not high enough passing trains would hit it, and that the defendant's superintendent repeatedly told the plaintiff to be sure to have the staging high enough to be out of the way of passing engines and trains, and if there is no evidence that the superintendent or any of the men suspected that the staging was too low for safety, and there was affirmative evidence that it could not have been put any higher and be of use, and if, as to warnings of approaching engines and trains, the testimony is that such warnings were given by the railroad company's flagman, who is not shown to be acting for the defendant, and occasionally by any one, superintendent or workmen, who happened to see a train approaching.

TORT for personal injuries received by the plaintiff while in the defendant's employ and at work upon a temporary staging in constructing with other workmen a steel bridge over the tracks of the Boston and Albany Railroad Company at Walnut Street in Newton. Writ dated June 5, 1906.

The declaration contained three counts under R. L. c. 106, § 71, cl. 2, alleging that the injuries to the plaintiff were caused by the negligence of a superintendent of the defendant or by one acting as such in the absence of the superintendent, and two counts at common law, the first of which alleged as the cause of the injury failure of the defendant to give to the plaintiff warning of the danger attendant upon the approach of a loco-

motive engine on the track beneath him, and the second of which alleged the cause of the injury to be negligence of the defendant in placing the plaintiff at work in a dangerous place without taking proper precautions to guard and to warn him, and in failing to guard and to warn him.

The case was tried before *Sherman, J.* The facts are stated in sufficient detail in the opinion. At the close of the evidence the presiding judge ruled that upon the evidence the plaintiff could not recover and ordered a verdict for the defendant, and at the request of the parties reported the case for determination by this court, the verdict to stand if the ruling was correct, and, if it was wrong, the verdict to be set aside and judgment to be entered for the plaintiff in the sum of \$1,000.

W. A. Buie, (J. R. Murphy with him,) for the plaintiff.

W. H. Hitchcock, for the defendant.

SHELDON, J. We think it clear that upon the common law counts the action cannot be maintained. The plaintiff fully appreciated that the work in which he was engaged was highly dangerous; he with his fellow workmen put in place the plank which constituted the staging on which he was sitting and the blocks or timbers upon which the plank rested; he knew that if the plank was not high enough the trains would hit it, and that for his own safety he must see to it that the plank was high enough to clear the trains. And he cannot upon these counts hold the defendant liable for any negligence of his fellow servants, even though they were superintendents or in some position higher than his own. *Ahern v. Hildreth*, 183 Mass. 296. *Healey v. George F. Blake Manuf. Co.* 180 Mass. 270. *O'Brien v. Rideout*, 161 Mass. 170. He knew that trains were frequently passing under this staging, and he relied upon his fellow servants or a flagman of the railroad company to give him whatever warning he was to receive of the approach of a train.

The plaintiff has also in counts under the statute alleged the negligence of a superintendent. R. L. c. 106, § 71. St. 1909, c. 514, § 127. But he cannot recover upon the failure of the superintendent to warn him of the approach of this train, for he knew that neither the superintendent nor any one else in behalf of the defendant had undertaken to do so. The testimony was that such warnings were given by the railroad company's flag-

man, and occasionally by any one, superintendent or workman, who happened to see a train. And there was nothing to show that the flagman was acting for the defendant or in the discharge of any duty entrusted to him by the defendant. This case is not like *Boucher v. New York, New Haven, & Hartford Railroad*, 196 Mass. 355, or *Brow v. Boston & Albany Railroad*, 157 Mass. 399, relied on by the plaintiff.

The plaintiff contends that the superintendent was negligent in having the staging laid too low. But all the evidence is that the superintendent repeatedly told the plaintiff who constructed the staging to be sure to have it high enough to be out of the way of engines and trains. And the plaintiff testified, and there is nothing to the contrary, that the staging was just high enough to enable the men to do the riveting; that if it had been any higher they could not drive the rivets. There is no evidence that the superintendent any more than the men suspected or in the exercise of due care ought to have suspected that the staging was too low for safety; and there is affirmative evidence from the plaintiff that it could not practicably have been put higher. And if this is so, the plaintiff's injury, if not due solely to one of the obvious risks of his employment, was at least not due to any negligence on the part of the superintendent.

It is not necessary to consider whether the plaintiff was himself in the exercise of due care, or whether he had assumed the risk of the accident which happened. According to the terms of the report, judgment must be entered on the verdict.

So ordered.

AMEDAS COTE vs. D. W. PINGREE COMPANY.

Essex. January 14, 1910. — February 25, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability. Practice, Civil, Entry of judgment. Supreme Judicial Court.

The declaration in an action of tort by an employee in a box factory against the proprietor of the factory alleged that the plaintiff was injured by reason of negligence of the defendant in not giving to him sufficient instructions or warnings of the dangers attending his work. At the trial it appeared that at the time of his injury the plaintiff was eighteen years of age and had worked for the defendant for six or seven weeks. From his appearance and manner of testifying the jury might have been of opinion that he was below the average intelligence of one of his age, but there was no evidence that the defendant had any notice of such mental deficiency or any reason to have apprehended it. The plaintiff was injured while operating a matching machine, which was composed of an iron table set on four iron legs and having upon it two circular saws six inches in diameter each set in a slot about an inch in width and ten inches long. Three eighths of an inch of each saw was above the surface of the table. Beneath the table and fitting into the space between its legs was a box meant to catch the shavings and to be removed by the operator from time to time. There was evidence that the plaintiff never had been warned as to the part of the saw under the table, nor instructed to avoid it, and he testified that he did not know that the saw went under the table or that there was anything there to cut his hand. While he was reaching down to draw out the box his hand, because a part of the box was broken off, went under the table farther than he had intended and was injured by the saw. *Held*, that it was difficult to say that the plaintiff's injury did not come from an obvious risk of his employment; but, without deciding that question, that there was no evidence that the defendant was negligent in failing to instruct or warn the plaintiff under the circumstances.

Where an employer has no notice or reasonable ground for apprehension that an employee is afflicted with a mental deficiency, he is justified in assuming that the employee is of ordinary intelligence and needs only the warnings and instructions which a workman of ordinary intelligence would require.

In this case, although the defendant had not asked this court to order judgment in its favor in accordance with St. 1909, c. 236, upon the sustaining of exceptions by the defendant to a refusal of the trial judge to order a verdict in its favor at the close of all the evidence, this court, being of the opinion that the case came within the terms of that statute, ordered judgment to be entered for the defendant.

TORT for personal injuries received by the plaintiff while working upon a machine called a "matcher" in the defendant's box factory. The third count of the declaration, which was the only count upon which the case was submitted to the jury,

alleged as the cause of the injury a failure of the defendant to give to the plaintiff sufficient instructions or warnings. Writ dated October 22, 1904.

The case was tried before *Sanderson, J.* Besides the facts stated in the opinion, it appeared that the plaintiff at the time when he was injured was eighteen years old and had been working for the defendant for six or seven weeks, for the most of that time being employed upon the machine upon which he was injured.

That machine was used to cut a tongue and groove in thin boards such as are necessary for the construction of boxes, and it consisted of an iron table about forty inches in length and sixteen inches in width, supported on four iron legs. Through this iron table there were two slots about one inch in width and ten inches long, through each of which passed a circular saw six inches in diameter. Three eighths of an inch of one saw extended through the slot above the surface of the table. Four and five eighths inches of the saw were beneath the table. The saws, revolving on the same axis, were operated by a belt next to the table which runs directly up and down to loose and tight pulleys directly overhead. This belt was manipulated by a shipper, by the management of which the belt was shifted from the loose to the tight pulley. The shipper was exactly at the right of the machine and almost overhead, and, if the operator stood at the head of the table, he could work the shipper with his hand and so move the belt from the loose to the tight pulley. Beneath the table was a box, so built that it fitted between the four legs, the purpose of which was to gather the shavings as the saw cut the tongue and groove in the boards. When the machine was at a standstill, the teeth of the saws could be seen extending through the slots, and when the machine was in operation, while the teeth were not individually visible, the saw itself was visible as revolving and in operation. It was conceded that there was a sufficiency of light there.

Other facts are stated in the opinion.

At the close of the evidence the defendant asked for a ruling, among others, that a verdict be ordered for the defendant. The ruling was refused, the jury found for the plaintiff in the sum of \$4,000; and the defendant alleged exceptions.

W. Coulson, for the defendant.

H. J. Cole, for the plaintiff.

SHELDON, J. The plaintiff conceded at the trial that there was no defect in the machine upon which he was at work when he was injured, and the third count only of his declaration was submitted to the jury. The defendant's exceptions present the question whether the plaintiff was bound to examine and ascertain what was underneath the table of the machine before putting his hand there, and whether a verdict ought to have been ordered for the defendant. This depends upon whether the jury had a right upon the evidence to find that the defendant was negligent on the ground that it did not give to the plaintiff sufficient instructions or warnings of the dangers which caused his injuries.

The plaintiff's contention was that he put his hand under the table to pull out the box of shavings, which he had been told to do; that by reason of the corner of the box having been knocked off, leaving a hole there, his hand went in farther than it otherwise would have done, and was caught in that part of the saw which was underneath the table. He testified that he did not know that the saw went underneath the table or that there was anything there to cut his hand, and that he had not been told to stop the machine before pulling out the box; and he said that he had repeatedly pulled out the box in the same way while the machine was in motion, in the presence of St. Pierre, who gave or caused to be given to him whatever instructions he received, and that he had not been told by any one that there were saws projecting under the table or that there was any danger in doing as he did on this occasion.

It is difficult to say that the plaintiff's injury did not come from an obvious risk of his employment. The saws projected a little above the surface of the table, and did their work by revolving. It seems to be manifest that they must also project for a greater or less distance underneath the table. And the risk of putting one's hand within the reach of such saws, when they are known to be in motion, is certainly an obvious one. *Stuart v. West End Street Railway*, 163 Mass. 391. It is not material that the plaintiff did not in fact know of this particular danger when he entered the defendant's employ if, by such ex-

amination as he readily could make, he would have learned of its existence. *McCafferty v. Lewando's French Dyeing & Cleansing Co.* 194 Mass. 412. *Gleason v. Smith*, 172 Mass. 50, 52. *Mutter v. Lawrence Manuf. Co.* 195 Mass. 517. *McKenna v. Gould Wire Cord Co.* 197 Mass. 406. But if we assume that this doctrine would not apply to the plaintiff by reason of his comparative youth and inexperience, and of the fact that there was a certain difficulty in seeing the position and arrangement of the saws beneath the table of the machine, as his counsel has earnestly contended (*De Costa v. Hargraves Mills*, 170 Mass. 375), we are brought to the question of whether it can be said that the defendant ought to have warned him of the real state of affairs and of the danger which was involved therein.

We cannot see any ground for saying that the defendant ought to have supposed that the plaintiff needed such a warning. The arrangement of the saws, the length of the slots through which they passed, the work that they did and the manner in which they did it were such that the defendant would be justified in supposing that any one of average intelligence would see at once that they must protrude below the table even more than they did above it, and in relatively the same places above and below. It is not negligence for an employer to fail to warn a workman of a danger when there is no reason to suppose that there is any need of such warning. *Lemoine v. Aldrich*, 177 Mass. 89, 91, and cases cited. The plaintiff's injury was not due to such a peculiar cause, outside of what the defendant had a right to suppose the plaintiff would know about, as was the case in *Halley v. Nashua River Paper Co.* 202 Mass. 164, and in *Grace v. United Society called Shakers*, 203 Mass. 355.

But it is contended that the jury could find that the plaintiff was below the average intelligence of people of his age, and so stood in peculiar need of information and warning. *Doolan v. Pocasset Manuf. Co.* 200 Mass. 200. But the only contention made at the trial was that the jury should find this "because of his appearance and manner of testifying." This is far below the evidence in the case just cited. Nor is there any evidence or any contention that the defendant or any one who acted for it had notice of any lack of intelligence in the plaintiff, or any reason

to apprehend that he was afflicted with a mental deficiency. But without such notice or reasonable ground of apprehension it was of course proper for the defendant to act on the assumption that he had ordinary intelligence. The question still was whether he appeared to be in need of information that he did not receive. *Ciriack v. Merchants' Woolen Co.* 151 Mass. 152, 157.

It is impossible to avoid the conclusion that the plaintiff's injury was due to his thrusting his hand under the revolving saw in a manner and to an extent which the defendant was not bound to anticipate or to warn him against. It is not a case in which he was doing just what he had been told to do and in the way that he had been told to do it, as in *Byrne v. Learnard*, 191 Mass. 269.

Although the defendant has not asked us to order judgment in its favor under St. 1909, c. 236, yet the case comes within the terms of that statute. The order will be

Exceptions sustained and judgment for the defendant.

SAMUEL KNOWLES *vs.* EMILY H. KNOWLES.
SARAH KNOWLES *vs.* SAME.

Bristol. January 18, 1910. — February 25, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Equity Pleading and Practice, Report, Appeal. *Evidence*, Competency. *Insurance*. *Gift*.

While it is the general rule that objections to rulings of a single judge at the hearing of a suit in equity as to the admission or exclusion of evidence can be brought before this court only by exceptions and not by an appeal with a report of the facts found or of the evidence, nevertheless where the judge files a "memorandum of facts" containing the facts found by him and also an explicit statement as to the nature of certain evidence offered by the plaintiff and excluded, with two reasons for excluding it, and states that, "after consultation with counsel I excluded [the evidence] on the latter ground, so that the rights of the plaintiff might be saved," and, after a decree was entered dismissing the bill, the plaintiff appealed, this court held that the correctness of the ruling excluding the evidence was before them for determination.

The provision of R. L. c. 118, § 73, that "every policy which contains a reference to the application of the insured . . . must have attached thereto a correct copy

of the application, and unless so attached the same shall not be considered a part of the policy or received in evidence," was intended solely to regulate the rights of policy holders and of the insurance companies against each other, and does not apply so as to exclude an application, a correct copy of which has not been attached to the policy issued upon it, where such application is offered in evidence in a suit between persons claiming ownership of the policy and the insurance company is not a party to the suit.

On appeal from a final decree of a judge of the Superior Court, if the judge filed a memorandum containing his findings of facts, this court can draw such inferences from the facts so found and reported as are reasonably to be made from the facts found and are not inconsistent with any of them.

A father made application to an insurance company for insurance on the life of his son, a minor, and the company issued thereon a policy in which no beneficiary was named but the company agreed to pay the amount of the policy "upon receipt of proofs of the death of the insured and upon surrender of the policy and all receipt books." The father paid the premiums upon the policy for several years until the son became of age, whereupon he delivered the policy to his son and thereafter the son paid the premiums until his death. After the son's death his widow, who also was the administratrix of his estate, refused to deliver the policy to the father, and the father by a suit in equity attempted to compel such delivery. *Held*, that the suit should be dismissed, since the ownership of the policy had passed by a completed gift to the son.

TWO BILLS IN EQUITY, the first filed on January 21, 1909, and the second on November 3, 1909, each to compel the defendant to deliver to the plaintiff therein a policy of insurance which the plaintiff alleged had been taken out for the plaintiff's benefit upon the life of Samuel Knowles, the son of the plaintiffs in the two suits.

The suits were heard before *Stevens, J.* He filed in each case a paper entitled "Memorandum of Facts," which was as follows:

In 1900 [1902 in the second case] the plaintiff [the plaintiff's husband in the second case] caused a policy of insurance to be issued by the Metropolitan Life Insurance Company of New York on the life of his son, Samuel Knowles, Jr., then a minor, a copy of the policy being annexed. The contract was a Massachusetts contract and the policy was issued in Fall River. The policy was retained by the plaintiff until after his son became of age and was married and then he delivered it to him. Until that time the premiums were paid by the plaintiff out of his money. After the delivery of the policy to the son he [the son] paid the premiums till his death in January, 1909, a period of nearly three years. There being no specific beneficiary named in the policy, the plaintiff contended that when an application was made for the insurance his [her in the second suit]

name appeared therein as beneficiary, and offered to prove that fact by parol testimony, the original application being on file at the New York office. "I refused to admit this testimony on two grounds, first, because the written application was the best evidence, and secondly, because if the application were here it would not be admissible, but after consultation with counsel I excluded it on the latter ground, so that the rights of the plaintiff might be saved." The defendant was the widow of Samuel Knowles, Jr., and the administratrix of the estate and claimed the insurance money.

From the copy of the policy annexed to the memorandum of the judge, it appeared that no specific beneficiary was named in either policy, and that the first paragraph of each policy read as follows:

"In consideration of the statements in the printed and written application for this policy, a copy of which is hereto annexed, all of which are hereby made warranties and part of this contract, and of the payment of the premium mentioned in the schedule below, on or before each Monday, doth hereby agree, subject to the conditions below, to pay upon receipt of proofs of the death of the insured made in the manner to the extent and upon the blanks required herein, and upon surrender of this policy and all receipt books the amount stipulated in said schedule. Provided, however, that no obligation is assumed by the company prior to the date hereof, nor unless on said date the insured is alive and in sound health."

Decrees were entered dismissing the bills without costs; and the plaintiffs appealed.

The cases were submitted on briefs.

F. A. Pease, for the plaintiffs.

J. W. Cummings, C. R. Cummings & J. Little, for the defendant.

SHELDON, J. It is the general rule that objections to rulings made by a single judge at the hearing of an equity cause upon the admissibility of evidence can be brought before this court only by exceptions, and not by appeal with a report of the facts found or of the evidence. The object of such a report is merely to bring before this court on an appeal the facts which otherwise would not appear upon the record. *Dorr v. Tremont National*

Bank, 128 Mass. 349. *Worcester v. Lakeside Manuf. Co.* 174 Mass. 299. *Cleveland v. Hampden Savings Bank*, 182 Mass. 110. See *McCusker v. Geiger*, 195 Mass. 46, 52. But we are of opinion that in these cases the judge by his report has not only made a statement of his findings, but also has brought before us the question of the correctness of his ruling excluding the application for each policy of insurance; and we therefore consider the question.

The ruling was based entirely upon the provision in R. L. c. 118, § 73, that "every policy which contains a reference to the application of the insured, either as a part of the policy or as having any bearing thereon, must have attached thereto a correct copy of the application, and unless so attached the same shall not be considered a part of the policy or received in evidence." See now St. 1907, c. 576, § 73. But a reference to the whole of that section shows, in our opinion, that it was intended solely to regulate the rights of policy holders and of the insurance companies against each other. That sufficiently appears from an examination of the sentence immediately preceding the one quoted. That sentence lays down a rule to be applied in the trial of actions between those claiming under a policy and the insurance company which issued it. The cases in which the rule has been considered by this court have been such cases. See for example the line of cases beginning with *Considine v. Metropolitan Life Ins. Co.* 165 Mass. 462, and ending with *Bonville v. John Hancock Mutual Life Ins. Co.* 200 Mass. 197, and especially *Holden v. Prudential Ins. Co.* 191 Mass. 153, 157, and *New York Life Ins. Co. v. Hardison*, 199 Mass. 190, 194. The statute does not lay down a rule to be applied to parties who claim conflicting rights against each other, in policies of insurance. Such claims are not claims arising under the policies; they are claims to the policies. Accordingly we are of opinion that in each of these cases the application was competent to be put in evidence.

But it does not follow that the final decrees appealed from should be reversed. If the original applications were before us and were found to read exactly as contended by the plaintiffs, yet the bills could not be maintained. It would appear in each case that the respective plaintiffs had accepted a policy on the

life of their son which was not payable to any named beneficiary, and had kept it without objection and had paid the premiums upon it until the son became of age and was married. Each policy was then delivered by its holder to the son, and he paid the premiums until his death nearly three years afterward, when it passed into the hands of the defendant, who, besides being his widow, is the administratrix of his estate, and claims the insurance. This court on appeal can draw such inferences from the facts found and reported as are reasonably to be made from those facts and are not inconsistent with any of them. *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 200. *Rosenberg v. Schraer*, 200 Mass. 218, 221. And upon the facts found by the judge, with such original applications, it is impossible to avoid the conclusion that whatever right of ownership each plaintiff had previously had in his or her policy had passed by a completed gift from that plaintiff to the son, and that thereafter they had become his own, and he had treated them as such, with the consent of each plaintiff. It follows that they are rightfully held by the defendant as the administratrix of his estate, and that the decree dismissing each bill must be affirmed.

So ordered.

CARL H. JOHNSON vs. ANDREW C. SCOTT & others.

Suffolk. January 18, 1910. — February 25, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Evidence, Presumptions and burden of proof, Of foreign law. Equity Pleading and Practice, Master. Equity Jurisdiction, To rescind sale procured by fraud. Fraud.

In a suit in equity to rescind for fraud a sale and conveyance to the plaintiff of all of the defendant's right, title and interest in certain real estate in another State and to restore to the plaintiff what he paid therefor, the plaintiff introduced before a master, to whom the suit was referred, evidence tending to show that the defendant had purchased the land at a tax sale in the State where it was situated, but that shortly afterwards the defendant had been told by various persons in official positions that in their opinions his title so procured was of no value, and had been shown evidences that others were claiming the land, that thereafter he represented to the plaintiff that his title was unquestionable and that he knew nothing questionable about it, and by various means induced him to purchase the land without investigating the title. *Held*, that the question,

whether the defendant's title was of value, was one of fact for the master to pass upon, and that its determination in no way depended upon whether the defendant's tax deed had or had not been avoided by a court of the State where the land was situated.

A void tax deed is not *prima facie* evidence of title.

One, who had purchased at a tax sale in another State land, which was described in the deed given to him only as "1577 acres in F. grant," and who thereafter was informed by various persons in official positions that the title which he had procured was of no value, thereafter represented to a prospective purchaser that the title to the land was unquestionable and that he knew nothing questionable about it, and, with the aid of an agent, who knowingly made like false representations, induced the prospective purchaser to buy the land without investigating the title, and to give to the holder of the tax deed \$1,201 and to the agent, as a part of the same transaction, a note for \$1,299, secured by a mortgage, to cover the amount of \$1,300 which he supposed the agent was lending to him and which he supposed was paid to the seller. The agent paid the seller only \$800. The tax title was worthless. *Held*, that the purchaser might maintain a suit in equity to rescind the transaction and to have the seller and the agent place him in *status quo*.

A court of equity will not concern itself with the respective rights among themselves of wrongdoers who are defendants in a suit in equity to set aside a sale procured by their fraud.

BILL IN EQUITY filed on October 9, 1908, alleging that the defendants induced the plaintiff to pay money and to give a note and mortgage for a quitclaim deed of land in the State of Maine, by representing to him that the defendant Scott had a title from the State of Maine which was unimpeachable and which they had been told was unimpeachable by legal advisers, which representations they knew to be false.

The case was referred to James D. Colt, Esquire, as master. The substance of his report is as follows:

On September 21, 1904, the treasurer of the State of Maine sold to the defendant Scott for \$29.16 at public auction for non-payment of taxes land which in the advertisement of the sale had been described as containing fifteen hundred and seventy-seven acres of land lying in Fryeburg Academy Grant in the county of Oxford. The deed which he made to Scott described the land as being "situate in the county of Oxford" and as containing "1577 acres in Fryeburg Academy Grant." There was no other description. The Fryeburg Academy Grant contained about four thousand acres of land.

After he had paid taxes for several successive years upon what he supposed had been conveyed to him, Scott was told by various persons in official positions that in their opinions the

State could not have given him title, owing to the insufficiency of the description of the lands in the assessor's office. He testified that thereafter he consulted counsel in Portland, Maine, who told him in substance that he might select any fifteen hundred and seventy-seven acres of land in the Fryeburg Academy Grant and remove the timber therefrom until he was stopped by some one who could show a better title than he.

As Scott became convinced that his title to the fifteen hundred and seventy-seven acres was at least doubtful, he became correspondingly desirous of selling out, and took steps to find a purchaser. In the summer of 1908, while he was trying to find a purchaser for his title, he talked with one William M. Torrey, who afterwards called it to the attention of the defendant Murdock.

As a result of his conversation with Torrey, Murdock went to Maine and visited the property. At that time Murdock was not acquainted with Scott. He was afterwards introduced to Scott by Torrey, and became sufficiently interested to make a second trip to Maine for the purpose of ascertaining the value of the timber on the property. After inspecting the property, Murdock visited the State House in Augusta in order to find out whether Scott had paid the taxes. While there, Murdock was informed by the clerk of the State board of assessors that, in his opinion, Scott's title was worthless and that any tax title given by the State of Maine to land in the Fryeburg Academy Grant was worthless for the reason that the land in the grant had never been legally divided into lots. After making this visit to Maine, Murdock decided not to purchase from Scott.

The plaintiff is a native of Sweden. He is an attorney at law, having been admitted to the bar in 1903. Since his admission he has practised his profession in Boston.

In August, 1908, the defendant Scott was introduced to the plaintiff. At the ensuing interview Scott told the plaintiff that he had the land for sale and that his price was \$3,500, but that he would sell for \$2,500 cash. There were a number of interviews during the next two weeks and Scott made certain statements about the land and his title to it, in answer to inquiries of the plaintiff. He represented that he had a good title to fifteen hundred and seventy-seven acres of land in the Fryeburg Academy

Grant, and in support of this representation showed his deed from the State of Maine and certain of the tax receipts and the statutes of the State of Maine which provide that where a tax title is not redeemed within one year the fee becomes absolute in the owner of the tax title. He allowed the plaintiff to take the tax title deed for examination and urged him to go and look at the property itself. The plaintiff stated that he wished time in which to examine the title, but Scott said there were others who wished to buy the property, with whom he was talking, and he would therefore give no option. He stated that a prominent attorney in Portland, Maine, had told him he could select fifteen hundred and seventy-seven acres of land in the grant and cut the timber and that his title, coming from the State, was the best or as good as any title in the grant. Scott also called the plaintiff's attention to the fact that there was a ready market for the timber not far from the grant, and said that he was selling because he was too old to look after it himself. He also told the plaintiff, in response to inquiry, that he had given him all the information he had regarding the property and his title thereto. He did not tell the plaintiff, however, of the opinions which the Maine officials had expressed as to the infirmity of his title, nor did he tell him of the fact that the register of deeds of Oxford County had exhibited to him a plan of the Fryeburg Academy Grant which showed the grant divided into lots and had told him who occupied or claimed to own some of the lots.

At one of the early interviews regarding the purchase, Scott brought the defendant Murdock to Johnson's office and introduced him as a man who had personally examined the property and knew its value. From that time on the plaintiff had frequent interviews with Murdock who represented that he was acting as a broker for Scott in the sale of his land, that he had examined the timber and considered the property of great value. He stated that, if it were not that he was interested in a mining proposition in Nova Scotia, the plaintiff would not have had the chance to buy the land, and that he would recommend the property to his father or brother or a brother mason. The plaintiff told Murdock that he had not had time to investigate the property and must rely upon what he and Scott told him. He asked Murdock if he knew of anything out about the property, and

Murdock replied that he did not. This was after Murdock had visited the State House in Augusta and learned that the title was very doubtful. Murdock was Scott's agent throughout the negotiations and as such agent did what he could to promote the sale to the plaintiff.

The plaintiff believed the representations made to him by both Scott and Murdock, including the representation that the price to be paid Scott for the land was \$2,500 in cash. He was able to raise but \$1,200 of the necessary \$2,500. Scott refused to accept a mortgage as part payment and the plaintiff so informed Murdock on September 25, whereupon Murdock said he would endeavor to borrow \$1,300 from his sister, and if successful would lend it to Johnson, taking back a mortgage on the land for that amount as security. Murdock then went to his sister and obtained from her, not \$1,300 but \$600, which money was represented by a savings bank check.

On September 26, Scott, Murdock and Torrey came to the plaintiff's office late in the afternoon. The plaintiff handed \$1,200 in cash to Scott, and Murdock handed Scott a savings bank check which the plaintiff supposed was a check for \$1,300, but which was the check for \$600 above mentioned. Scott then delivered the deed to the plaintiff, and the plaintiff delivered a mortgage and a note secured thereby for \$1,299, and one dollar in cash to Murdock, and the transaction was completed.

A short time after he had received the deed from Scott, Johnson discovered the fraud.

The report continues: "No court having jurisdiction over the land in question has, so far as appeared from the evidence, held Scott's title to be invalid, nor has any one appeared claiming an adverse or superior title, and the respondents therefore urged that Johnson had obtained all that he sought to buy, an undivided interest amounting to fifteen hundred and seventy-seven acres of the Fryeburg Academy Grant, and so has no cause for complaint. This would probably be true if the State of Maine had owned the entire grant at the time it made its deed to Scott. The deed undertakes to convey a definite number of acres in a much larger tract, no part of which, so far as appears, belonged to the State, and its right to make the conveyance is a statutory right arising

out of the failure of the real owner or owners of those acres to pay the taxes assessed upon them, yet nowhere does it appear who the real owners were, nor is there anything to indicate what lands were meant by the description in the deed. *There were other owners of land in the Fryeburg Academy Grant, whose titles the State had not disturbed by tax sales or otherwise. From all of which it seems clear that the deed from the State of Maine to Scott had no value as it conveyed no ascertainable interest in land located in Fryeburg Academy Grant.

"No reason exists for any one's making an adverse claim to the fifteen hundred and seventy-seven acres which the State attempted to convey. The recording of Scott's deed was not notice to any of the owners of land in the grant that he claimed or could claim an interest in their land. It is therefore not surprising that neither Scott's nor Johnson's so called title has been disputed or passed upon by a court having jurisdiction over the land.

"I find that the deed from Scott to Johnson conveyed no title as Scott had nothing to convey by virtue of his deed from the State of Maine. It is apparent from the facts found that a fraud was intentionally perpetrated on Johnson and that both Scott, Murdock and Torrey participated therein. . . .

"Furthermore, Johnson was deceived in regard to the mortgage. He was led to believe that an actual cash consideration of \$1,300 was being paid for the mortgage while in reality only \$600 was paid. Murdock had told him that he would try to obtain from his sister the \$1,300 which with Johnson's \$1,200 would make up the \$2,500 required by Scott. He told him later that he had been successful in obtaining the necessary money from his sister. He did not say that all he obtained was \$600 but left Johnson to infer that it was \$1,300. The Savings Bank check which was handed to Scott when the papers were passed was not shown to Johnson, although he might have seen it by asking for it, and he supposed and was allowed to believe that it was for the larger amount. He could not have been more deceived, if \$600 in good and \$700 in counterfeit money had been handed to Scott. Johnson's note and mortgage were given to Murdock on the understanding that Murdock was to advance the full consideration therein mentioned and he supposed and had a

right to suppose that this had been done when he delivered the note and mortgage to Murdock."

The defendants filed exceptions to the master's report, material among which are the following:

"12. To the finding of the master that 'it seems clear that the deed from the State of Maine to Scott had no value,' the stated ground of the exception being that "this is a matter of law and not of fact and outside the rule to the master and without jurisdiction of this court to hold invalid the deed of the State of Maine which has not been so held by the Maine courts."

"13. To the finding of the master that 'the deed from Scott to Johnson conveyed no title, as Scott had nothing to convey by his deed from the State of Maine,' the stated ground of the exception being the same as that of the twelfth exception.

"14. To the finding of the master that 'it is apparent from the facts that a fraud was intentionally perpetrated on Johnson and that both Scott and Murdock and Torrey participated therein,' the stated ground of the exception being "that the finding is a matter of law and not of fact and is outside the rules of the master and furthermore that the facts in the case as found by the master and on the evidence before him, are not sufficient to constitute an assumption of fraud."

"16. To the finding of the master that 'Johnson was deceived in regard to the mortgage and that he was misled by Murdock' and to the master's finding which compared the transaction to a possible deception by the passing of counterfeit money," the stated ground of the exception being "that the evidence shows and the master's own findings show that Johnson knew and understood that Murdock and Torrey were to receive what Johnson called a commission out of the \$2,500 purchase money for the property and the fact that Murdock paid Scott in Johnson's presence \$600 and retained his profit, commission or recompense for raising the money and as claimed assisting in the sale of the property, was no deception to Johnson. It is immaterial whether Murdock paid \$1,300 to Scott in Johnson's presence and then received \$700 back, or whether he retained it when the transaction was closed, especially as no false representation was made to Johnson and according to the master's finding, Johnson might have seen the check by asking for it."

"17. To the failure of the master to find that under the tax title deed of the State of Maine, the grantee therein would have the right to go on, cut and remove timber therefrom," the stated ground of the exception being "that a tax title deed is *prima facie* evidence of title and as such is a title of value giving the owner the right to take possession and exercise acts of ownership."

"20. To the failure of the master to find that the quitclaim deed from Scott to Johnson conveyed something of value," the stated ground of the exception being "that Scott was the owner of an undisputed title to fifteen hundred and seventy-seven acres in Fryeburg Academy Grant as evidenced by a tax title deed from the sovereign State of Maine which at least barred the State of Maine from objecting to Scott or his assigns entering the property and cutting the timber or exercising other acts of ownership over it."

The exceptions were heard and overruled and a final decree was ordered for the plaintiff by *Pierce, J.* The defendant Murdock appealed.

W. H. Wood, for the defendant Murdock.

F. W. Campbell, for the plaintiff.

SHELDON, J. Both of the defendants Scott and Murdock filed numerous exceptions to the master's report, but only Murdock has appealed from the interlocutory decree overruling these exceptions and from the final decree which was entered in favor of the plaintiff.

The sixth of these exceptions has become immaterial in consequence of the addition made by the master to his report when the matter was called to his attention by the defendants' objection. As to the twelfth and thirteenth exceptions, it is enough to say that the other facts found by the master fully warranted the inference that "the deed from the State of Maine to Scott had no value, as it conveyed no ascertainable interest in land located in the Fryeburg Academy Grant." The validity and value of the title created by the deed depended upon the statute law of Maine, and it was purely a question of fact what that law was. *Callender, McAuslan & Troup Co. v. Flint*, 187 Mass. 104, 107. *Cherry v. Sprague*, 187 Mass. 113, 117. *Electric Welding Co. v. Prince*, 200 Mass. 386. But when such

a question of fact is presented to our courts, they must pass upon it; and their right to find that under the laws of Maine a deed conveys no title, or no title that is of any value, does not depend upon the question whether the deed has or has not been avoided in a Maine court. The fourteenth, sixteenth, seventeenth and twentieth exceptions relate to findings of fact which were well warranted by the subsidiary findings made. The master was not bound to find that the sum of \$700 obtained by Murdock as a secret profit from the plaintiff was really a fair commission honestly paid to him by Scott. And a void tax deed is not *prima facie* evidence of title. All the other exceptions are to mere findings of fact, as to which the evidence is not reported, and which for that reason we cannot disturb. *Lipsky v. Heller*, 199 Mass. 310, 313. The decree overruling the exceptions and confirming the master's report must be affirmed.

From the master's report it is plain that a fraud was perpetrated upon the plaintiff by which he was induced to pay \$1,201 in money and \$1,299 in his note secured by a mortgage for what was of no value, and that both Scott and Murdock participated in this fraud. The decree entered in the Superior Court was right. *Holst v. Stewart*, 161 Mass. 516. *Burns v. Dockray*, 156 Mass. 135.

We need not consider whether Murdock has any remedy for contribution or otherwise against Scott. The court does not concern itself with the respective rights of wrongdoers among themselves. *Light v. Jacobs*, 183 Mass. 206. *Rowley v. Towsley*, 53 Mich. 329.

The final decree appealed from is to be modified so as to charge Murdock with the costs of this appeal, and so modified is

Affirmed.

ARTHUR D. HILL, receiver, *vs.* JAMES E. BAKER.

SAME *vs.* DONNELL & MCKOWN.

SAME *vs.* WILLIAM R. WING.

SAME *vs.* RIVER PLATE SHIPPING COMPANY, LIMITED.

SAME *vs.* BENJAMIN W. HODSDON.

THORNTON K. LOTHROP, JR., *vs.* ARTHUR D. HILL, receiver.

Suffolk, Essex. January 18, 19, 1910. — February 25, 1910.

Present : KNOWLTON, C. J., HAMMOND, BRALKY, SHELDON, & RUGG, JJ.

Insurance, Marine, Mutual. Receiver.

In an action by the receiver of the property of a mutual marine insurance company, appointed under St. 1907, c. 576, § 8, to settle its affairs, brought upon a promissory note given by a policy holder for an insurance premium covering the whole term of the policy, only a portion of which had expired when the insurance company was enjoined from doing business and the plaintiff was appointed the receiver of its property, it appeared that the policy described the insured as a member of the company, and that the company was created by a special charter by which it was authorized to make "insurance against maritime losses on the mutual principle, with all the powers and privileges, and subject to all the duties, liabilities, and restrictions, set forth in the thirty-seventh and forty-fourth chapters of the Revised Statutes, and all subsequent laws in force relating to mutual insurance companies, so far as applicable to" it, that the by-laws of the company provided that all persons who had property insured with it should be members of the company during the period of such insurance and should have votes accordingly, that the by-laws also provided for the division of profits among policy holders upon terminated risks, and that the policy provided that when a loss occurred the amount of any unpaid premium note without discount was to be deducted from the amount which the insured was entitled to receive. *Held*, that under the general rule applying to mutual insurance companies there was no liability on the part of the company for failing to continue the performance of its agreement when such performance had been made impossible by the action of the Commonwealth under existing laws, and that the premium for which the note was given was due absolutely upon the issuing of the policy and with other like premiums constituted a fund for the payment of losses, so that the plaintiff was entitled to recover the amount of the note in full.

In an action by the receiver of the property of a mutual marine insurance company, appointed under St. 1907, c. 576, § 8, to settle its affairs, brought upon a promissory note given by a policy holder for an insurance premium covering the whole term of the policy, only a portion of which had expired when the insurance company was enjoined from doing business and the plaintiff was appointed the receiver of its property, it appeared that the plaintiff was appointed temporary receiver on March 19 of a certain year and was made permanent receiver on March 27 of the same year, that on March 14 of the same year the defendant sent his policy to the company for cancellation, and that on March 16 the president of the company wrote in reply that the policy was cancelled as requested. There was no intima-

tion that this was not done in good faith on both sides in ignorance of the insolvency of the company, and the facts were such that this ignorance was possible even in case of the president of the company. The date of the filing of the bill on which the receivership was granted did not appear. *Held*, that the court must take the date of the appointment of the receiver as fixing the rights of the parties, and must treat the policy as having been cancelled when the president sent his letter saying that it was cancelled, and accordingly that the defendant was entitled to have a proper deduction made from the amount of the note for the period after March 16 when the surrender of his policy had been accepted.

In an action by the receiver of the property of a mutual marine insurance company, appointed under St. 1907, c. 576, § 8, to settle its affairs, brought upon a promissory note given by a policy holder for a premium for insurance upon a bark wherever she might go upon a whaling voyage during two years, of which less than one year had expired when the insurance company was enjoined from doing business and the plaintiff was appointed the receiver of its property, the policy provided that the premium should be "sixteen per cent for two years, to return for months not entered upon if no loss is claimed, warranting 12%." The policy contained the following provision: "If on a passage at the expiration of the term, and the company receives on or before that time a written request from the assured (but not otherwise), this insurance shall continue until noon of the day after arrival at first port of discharge . . . the assured paying pro rata monthly premium for each month entered upon." *Held*, that the provision that the premium should be returned for months not entered upon did not give the policy the character of an open one, under which the insurer could be held only for such risks as subsequently were assumed and indorsed upon the policy, but that here the term of insurance had been entered upon and would continue to run until the termination of the voyage or of the period of two years or until arrival at a port of discharge after an extension of that period by a written request.

SIX ACTIONS OF CONTRACT, the first five by the receiver appointed by a decree of the Supreme Judicial Court under St. 1907, c. 576, § 8, of the property of the China Mutual Insurance Company, a corporation created by St. 1853, c. 262, which was extended by St. 1875, c. 84, brought upon five several promissory notes given for marine insurance premiums by policy holders of that company, and the sixth action by a policy holder against the receiver for a part of a premium which had been paid by him and was alleged to have been unearned when his policy was cancelled by the decree of the Supreme Judicial Court perpetually enjoining the company from further proceeding with its business. Writs in the first and second actions in the Municipal Court of the City of Boston dated respectively November 3 and November 10, 1908, these cases afterwards coming by appeal to the Superior Court; writs in the third and fourth actions in the Superior Court for the county of Suffolk dated respectively April 16, 1908, and September 15,

1909; writ in the fifth action in the Superior Court for the county of Essex dated October 7, 1908, and writ in the sixth action in the Superior Court for the county of Suffolk dated January 12, 1909.

In the Superior Court by agreement of the parties the cases came on to be tried together before *Pierce, J.*, without a jury. In accordance with an agreement of the parties the judge found for the defendants in the first five cases, and in the sixth case found for the plaintiff, and reported the cases for determination of the full court. If his rulings were correct, judgments were to be entered for the defendants without costs in the first five cases, and in the sixth case for the plaintiff in the sum of \$17.50, without costs; otherwise, such judgments were to be entered as law and the facts required.

The policy in the case against Wing began as follows:

"By the China Mutual Insurance Company. Incorporated April 30, 1853. William R. Wing a member of said Co. on account of whom it concerns.

"In case of loss to be paid to him do make insurance, and cause to be insured, lost or not lost

"One thousand dollars on Bark Alice Knowles, at and from April 3rd 1907 at noon, to continue wherever she may go on a whaling voyage, with all the usual privileges, until April 3rd 1909 at noon. Prohibited from the Arctic Ocean, Hudson Bay and Cumberland Inlet.

"If on a passage at the expiration of the term, and the Company receives on or before that time a written request from the assured (but not otherwise), this insurance shall continue until noon of the day after arrival at first port of discharge; or, if the vessel has no cargo on board, then until noon of the day after arrival at the first port at which the said vessel may arrive and be moored twenty-four hours in safety, and no longer, either on hull or freight, the assured paying pro rata monthly premium for each month entered upon. If insured for a special voyage, this insurance shall continue only until the vessel shall be arrived and moored twenty-four hours (or the number of days, if any, specified in port), counting from noon of the day of arrival and on freight until landed."

The provision concerning the premium was as follows:

"The consideration for this insurance is hereby fixed at the rate sixteen per cent for two years, to return for months not entered upon if no loss is claimed, warranting 12%.

"To add one quarter per cent per month for each month entered upon after ninety days while lying in any port or anchorage."

A memorandum in the margin of the policy stated that the sum insured was \$1,000, that the vessel was valued at \$14,000 including premium, and that the premium was \$160.

A. D. Hill, (*F. H. Nesmith & A. G. Gill* with him,) for the receiver of the China Mutual Insurance Company.

C. W. Clifford, for the defendants in the first five cases and for the plaintiff in the sixth case.

SHELDON, J. When a mutual fire insurance company has become insolvent and a receiver has been appointed to settle its affairs under St. 1907, c. 576, § 8, its outstanding policies cease to afford any protection to their holders, being cancelled as to any future losses, but the premiums which have been paid, for future as well as past protection, and the contingent liability to assessment upon premium notes which have been given by the policy holders remain as a fund for the payment of all the debts and liabilities of the company, including losses that have been incurred. *Commonwealth v. Massachusetts Mutual Fire Ins. Co.* 119 Mass. 45; *S. C.* 112 Mass. 116. As was said by Wells, J., in the case last cited, "Each member is, at the same time, insurer and insured. In one aspect he is a mere holder of a policy, containing a contract of indemnity against loss by fire, with a specific and limited fund out of which that indemnity is to be made good. . . . In another aspect he is a member of the corporation, made so by the very nature of the contract, and so declared by law. . . . In this relation, he is an insurer, and is affected by another and very different class of obligations." The deprivation of the right to recover for a future loss does not of itself terminate his membership in the company and his consequent liability to contribute, to the extent of his note, to the payment of losses. *Cummings v. Sawyer*, 117 Mass. 80. The fundamental question in this case is whether the same rule is to be applied to the mutual marine insurance company of which the plaintiff in the first five of these actions is the receiver; whether policy holders in

that company are liable to the receiver upon their promissory notes given for insurance premiums, although the terms of the policies have not expired, and the total amounts of the premiums have not been earned, or in other words although they have not enjoyed the full benefit of the insurance for which their notes were given. This question is to be determined upon the several contracts of insurance and the statutes under which these contracts were made. *Pendergast v. Commercial Mutual Marine Ins. Co.* 15 Gray, 257.

In each of these cases the company has made a contract of insurance against definite risks for a fixed period and in consideration of a stipulated premium. In each case except the last the premium was paid, in whole or in part, by a note given by the insured to the company. Each policy describes the insured as a member of the company. By the charter of the company, St. 1853, c. 262, it was to make "insurance against maritime losses on the mutual principle, with all the powers and privileges, and subject to all the duties, liabilities, and restrictions, set forth in the thirty-seventh and forty-fourth chapters of the Revised Statutes, and all subsequent laws in force relating to mutual insurance companies so far as applicable to" this company. The by-laws of the company provide that all persons who have property insured with it shall be members of the company during the period of such insurance and shall have votes accordingly. And see Pub. Sts. c. 119, § 121, continued in force by R. L. c. 118, § 53, and St. 1907, c. 576, § 54. The by-laws also provide for the division of profits among policy holders upon terminated risks.

It seems clear to us that the effect of the policies under this provision of statute is that the policy holders must be treated as having taken their insurance strictly upon the mutual principle, unless there shall be found to be something in subsequent legislation to alter this. But the decisions already cited did not rest upon principles applicable only to mutual fire insurance companies. They went upon broad rules which were to be applied to all cases of mutual insurance, although modified by our statutes as to the manner of enforcing the contingent liability upon premium notes given as additional security to the company and its policy holders. Those general principles

have been applied and enforced in other States under statutes more or less similar to our own, without distinction as to the general doctrine between mutual companies, whether they issued insurance upon lives, against loss by fire, or upon marine risks. The cases as to fire insurance companies are of course more numerous. *Mygatt v. New York Protection Ins. Co.* 21 N. Y. 52. *Lawrence v. Nelson*, 21 N. Y. 158. *Doane v. Millville Mutual Ins. Co.* 16 Stew. 522. *Hillier v. Allegheny County Mutual Ins. Co.* 8 Penn. St. 470. *Dewey v. Davis*, 82 Wis. 500. *Taylor v. North Star Ins. Co.* 46 Minn. 198. But we find also decisions put upon the same grounds as to life insurance and marine insurance companies. *Hone v. Boyd*, 1 Sandf. 481. *Vanatta v. New Jersey Mutual Life Ins. Co.* 4 Stew. 15. *Mayer v. Attorney General*, 5 Stew. 815. The cases go on the general rule that there is no liability on the part of the insurance company for failing to continue the performance of its agreement when that performance has been made impossible by the action of the State under existing laws. *People v. Globe Mutual Life Ins. Co.* 91 N. Y. 174. *Baylies v. Fettyplace*, 7 Mass. 325. *Wade v. Mason*, 12 Gray, 335. *Woodward v. Cowing*, 13 Mass. 216. The fact that the insurance company has become insolvent, instead of being a reason against the full collection of outstanding premiums, furnishes a reason why they should be collected. *Fogg v. Pew*, 10 Gray, 409, 415. *Alliance Mutual Ins. Co. v. Swift*, 10 Cush. 433. *Lester v. Webb*, 5 Allen, 569. All these cases that have been referred to go upon the principle that the premiums paid or absolutely agreed to be paid by the members for their policies constitute a fund for the payment of losses; and the principle is the same whether the payment is in cash or by note, so long as the policy is issued upon the mutual principle to one who by accepting the insurance becomes a member of the insurance company. *State v. Manufacturer's Mutual Fire Ins. Co.* 91 Mo. 311. *Ohio Mutual Ins. Co. v. Marietta Woolen Factory*, 8 Ohio St. 348. *Hart v. Achilles*, 28 Barb. 576. *White v. Havens*, 20 How. Pr. 177.

We find nothing to alter the general principle in the legislation which followed the charter of this company. The definition of the "net assets" of a mutual marine insurance company in R. L. c. 118, § 1, St. 1907, c. 576, § 1, can have no such effect. We have been referred to no statute giving the right

to the return of any part of a premium or to an allowance of any part of a note given for a premium in a case like this; and we find no such statute. No such right is created by the stipulations of the policies or the by-laws of the company. The notes were given in payment of premiums absolutely due; they were to be paid in full, either in money or by the application of anticipated profits; each policy holder was a member of the company. The members were not to be sure to be assessed like policy holders in a mutual fire insurance company, for the very reason that it was expected that ultimately, in the one way or the other, their notes would be paid. And each policy upon which a note was taken provides that when a loss occurs, the amount of any unpaid premium note without discount is to be deducted from what the insured is entitled to receive. This shows the understanding of both parties that the premium note was absolutely payable. The language of Pub. Sts. c. 119, § 128, still in force as we have already seen, points in the same direction.

We cannot accede to the contention made for the policy holders that this company was not a mutual company.

It follows that in the action of Lothrop judgment must be entered for the defendant. In the cases against Baker and Donnell respectively, the plaintiff is entitled to judgment.

In the action against the River Plate Shipping Company, the policy was sent to the company on March 14, 1908, for cancellation, and on March 16 the president of the company wrote in reply that the policy was cancelled as requested. The plaintiff was appointed temporary receiver of the company on March 19, and permanent receiver on March 27, of the same year. We have not the date of the filing of the bill on which this was done, and must take the date of the appointment as fixing the rights of the parties. *Merrill v. Commonwealth Fire Ins. Co.* 171 Mass. 81. *Attorney General v. Massachusetts Benefit Life Association*, 171 Mass. 193. We are of opinion that we must treat the policy as cancelled on the day when the president wrote his letter saying that it was cancelled. There is no intimation that this was not done in good faith on both sides in ignorance of the insolvency, and such ignorance was possible, even in the president of the company. *Furber v. Dane*, 204

Mass. 412, 418. The case differs in this respect from *Doane v. Millville Mutual Ins. Co.* 16 Stew. 522. Accordingly the defendant is entitled to have a proper deduction made from the amount of its note for the period after March 16, 1908, when its policy was surrendered. *Fayette Mutual Fire Ins. Co. v. Fuller*, 8 Allen, 27. In this case there must be a new trial.

In the case against Hodsdon, the insured requested on March 26, 1908, that the policy be cancelled. This was after the appointment of the receiver, who answered that the matter would have his attention. But the rights of the parties had already been fixed. The plaintiff is entitled to judgment.

In Wing's case the premium was agreed to be sixteen per cent for two years. But the policy provided that the premium should be returned for months not entered upon, with a warranty of twelve per cent. This is not like the case of an ordinary open policy, in which the insurer is held only for such risks as are subsequently assumed and indorsed upon the policy. If that were so, the company and the receiver in its right would be entitled in an action like this to recover the amount only of the premiums upon such risks as had been so assumed. *Maine Ins. Co. v. Stockwell*, 67 Maine, 382. *Ellwell v. Crocker*, 4 Bosw. 22. But under this policy the term of insurance had been entered upon, and it would continue to run until stopped by a written request from the insured. As it does not appear that any such request was made, in this case also there must be judgment for the plaintiff upon his declaration.

Ordered accordingly.

EMMA F. WHITCOMB, executrix, vs. FRANK I. WHITCOMB.

Middlesex. January 20, 1910. — February 25, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Undue Influence. Fraud. Will. Practice, Civil, Exceptions. Probate Court.

Undue influence sufficient to invalidate a will may be exerted upon the testator either by fraudulent means or devices or by physical or moral coercion practised upon him without any actual deception.

Where an exception was taken by the contestant of a will to an instruction given

to the jury by the justice who presided at the trial of issues framed for the jury upon a probate appeal, on the ground that the instruction amounted to a statement "that undue influence must savor of fraud," and the bill of exceptions merely states that "there was evidence tending to show that the execution of the will was procured through the fraud or undue influence of" a certain person, and there is no further description of the evidence, the excepting party has not shown that he was aggrieved by the instruction, whether as an abstract proposition it was correct or not, because all the evidence may have related to undue influence exerted by fraudulent devices, in which case the instruction would be exactly appropriate as applied to the facts in evidence.

Undue influence sufficient to invalidate a will, even when it does not involve active deception or fraud and consists merely of a dominating and controlling influence exerted over the mind and will of the testator by means of excessive importunity or the mastery which one mind may sometimes gain over a weaker one, is a fraud upon the testator in causing him to make a disposition of his property different from that which he would have made voluntarily, and also is a fraud upon his heirs or those whom he otherwise would have made the subjects of his bounty, and in this sense, when speaking of undue influence which paralyzes the will of a testator and substitutes for his will the will of the person who exercises the influence, it is correct to say that an influence to be undue must partake of the nature of fraud.

APPEAL, filed in the Supreme Judicial Court on May 5, 1908, from a decree of the Probate Court for the county of Middlesex allowing the will and codicil of Irvine A. Whitcomb, late of Somerville.

The case was tried before *Loring, J.* Four issues were framed to be submitted to the jury. The first and third issues related to the soundness of mind of the testator at the times of the execution of the will and the codicil.

The second issue was as follows: "Was the execution of said instrument [the will] procured through the fraud or undue influence of Emma F. Whitcomb?" The fourth issue was as follows: "Was the execution of said codicil procured through the fraud or undue influence of Emma F. Whitcomb?"

Emma F. Whitcomb, who was named in the will as executrix, was the second wife of the testator. The appeal was taken by Frank I. Whitcomb, a son of the testator by his first wife.

In submitting the issues to the jury the charge of the justice contained the following instructions in regard to undue influence:

"Now, when the contestant says that this will was procured by the fraud and undue influence of Mrs. Whitcomb he has put forward an affirmative proposition, and it is for him to make it out.

"Now, what is meant by this issue? I am going to read this in terms as I did the other. 'Was the instrument procured through the fraud or undue influence of Emma F. Whitcomb?' Emma F. Whitcomb, of course, is Mrs. Whitcomb. Fraud or undue influence is the allegation which is contained there. If a wife should ask her husband to leave her some property in his will that would be influence, but it would be proper influence. It is not influence of that kind which is meant when an affirmative defense is set up that a will is procured by fraud or undue influence. Undue influence is influence which paralyzes the will of the testator and substitutes for his will the will of the person who exercises the influence. It is that kind of influence which is undue influence. It is coupled in this issue with the word 'fraud.' 'Fraud or undue influence.' It is coupled with the word 'fraud' because it partakes of the nature of fraud. An influence which does not partake of the nature of fraud is not undue influence. An influence which paralyzes the will of the testator, no matter by what means, is undue influence. It is true, as both counsel have said, that you always — I think I may say — have to make out undue influence by circumstantial evidence, — by inference; but the undue influence which you have to make out by inference is something that is in the nature of a fraud; by paralyzing the will of the testator, or substituting the will of the person who exercises the influence and gets him to sign a will which is not his will is in itself in the nature of a fraud. Now, that is what fraud or undue influence means in this issue. To make it out you must be satisfied that the person upon whom the influence was attempted to be exercised was a person who could be influenced. Secondly, that undue influence was in fact exercised, and thirdly, that it was successful so that as a result the paper signed by the testator was the will of the person who exercised the influence and not the will of the testator himself."

At the end of the charge the appellant took the following exception: "I desire an exception to that portion of the charge which states that undue influence must savor of fraud and that portion of your charge in connection with that."

To the first and third issues the jury answered "yes," finding that the testator was of sound mind when he executed the will

and the codicil; to the second and fourth issues the jury answered "no." The appellant alleged the above exception.

E. R. Anderson, for the appellant.

F. L. Norton, (*W. A. Ladd* with him,) for the appellee.

SHELDON, J. There is no doubt that undue influence may be exerted upon a testator either by fraudulent means or devices or by physical or moral coercion practised upon him without any actual deception. *Wingrove v. Wingrove*, 11 P. D. 81. *Davis v. Calvert*, 5 Gill & J. 269. *Stewart v. Elliott*, 2 Mackey, 307.

But even if we should say that for this reason the charge of the justice went too far as an abstract proposition, we could not sustain these exceptions. The bill of exceptions merely states as to this question that at the trial "there was evidence tending to show that the execution of the will was procured through the fraud or undue influence of Emma F. Whitcomb." There is a similar statement as to the execution of the codicil and nothing more. All of this evidence may have related to undue influence exerted by fraudulent devices, and so the charge of the justice may have been exactly appropriate to the state of the evidence before the jury. If that be so, no injury could have been done to the contestant. But it is always incumbent upon the excepting party to show that he was aggrieved or injured by the ruling to which he alleges exception. *Chandler v. Jamaica Pond Aqueduct*, 125 Mass. 544. *Linton v. Allen*, 154 Mass. 432, 440. *Smith v. Jagoe*, 172 Mass. 538. But we prefer to consider the general question.

In our opinion, the procuring of the execution of a will by means of undue influence is an act which partakes of the nature of a fraud, an act which necessarily imports at least a constructive fraud upon the party upon whom it is practised. This is of course so if the undue influence is, as will often be the case, gained or exercised through any active deception or fraud, so that the deception is itself an essential element of the undue influence. But even when this is not the case, when there is merely such a dominating and controlling influence exerted over the mind and will of the testator by means of excessive importunity or of the mastery which one mind may sometimes gain over a weaker one, yet the object which is consciously sought and gained is to lead the testator to make a will which is differ-

ent from the one he otherwise would have made, which is not the expression of his own desires, but which is dictated to him and imposed upon him by the person who thus influences him, which, as was said of the will of King Edward the Sixth of England, may be his testament, but is the will of the person who has thus dominated his mind and controlled his actions. All that is done in such a case, although no deception may have been practised upon the testator, although he is rather the victim of force than of fraud strictly so called, is done for the sake of palming off as his last will that which is not really such. It is a fraudulent purpose that is aimed at; and the guilty purpose stamps with its own character all the means which are employed for its attainment. This is none the less a fraud upon the testator, by causing him to make different dispositions of his property from those which otherwise he would have made, that it is also a fraud upon his heirs or those whom he would have made the objects of his bounty, even though the pecuniary loss may fall wholly upon the latter.

This court has already taken the view which we have stated. In *Phillips v. Chase*, 203 Mass. 556, the undue influence by which the respondent had induced his wife to address her petition to the Probate Court was merely a moral coercion exerted over her. There was neither allegation nor evidence that any deception had been practised upon her to lead her to do as she did. She was simply forced to act against her will. It was held (p. 560) that this was like the case of undue influence practised upon a testator, and (p. 563) that the act of so dominating his wife's will as to force her against her will to bring the petition was "a gross fraud upon his wife" as well as a fraud upon the court to which the petition was presented as her voluntary act. That case is decisive of the principle here stated. So it was said by Hoar, J., in *Baldwin v. Parker*, 99 Mass. 79, 84: "The objection to a will that it was obtained by undue influence is not one which it is easy to define with precision. The term seems to include both fraud and coercion."

The weight of authority in other jurisdictions is to the same effect. In many cases it is said that undue influence is a species of fraud, or that it partakes of the nature of fraud. *Barry v. Butlin*, 1 Curt. 637, 647. *Mackall v. Mackall*, 135 U. S. 167,

172. *Towson v. Moore*, 11 App. D. C. 377, 381. *Grove v. Spiker*, 72 Md. 300, 301. *Marshall v. Flinn*, 49 N. C. 199. *Wright v. Howe*, 52 N. C. 412. *Paine v. Roberts*, 82 N. C. 451. *In re Abee*, 146 N. C. 273. *Smith v. Henline*, 174 Ill. 184, 191. *Will of Stinger*, 72 Wis. 22, 27, quoted approvingly in *Bryant v. Pierce*, 95 Wis. 331, 339. *Clough v. Clough*, 10 Col. App. 433, 443. *Shipman v. Furniss*, 69 Ala. 555, 565. *Eastis v. Montgomery*, 93 Ala. 293. And see *Shailer v. Bumstead*, 99 Mass. 112, 121; *Woodbury v. Woodbury*, 141 Mass. 329; *Maynard v. Tyler*, 168 Mass. 107, 114; *Bacon v. Bacon*, 181 Mass. 18, 22; *Boyse v. Rossborough*, 6 H. L. Cas. 2; *Kinleside v. Harrison*, 2 Phillim. 449, 451; *Barnes v. Barnes*, 66 Maine, 286; *Marx v. McGlynn*, 88 N. Y. 357, 370; *Eckert v. Flowry*, 48 Penn. St. 46, 52; *Schofield v. Walker*, 58 Mich. 96; *In re Jackman*, 26 Wis. 104, 113; *In re Darst's Will*, 34 Ore. 58, 65; *Turner's Will*, 51 Ore. 1, 8; *Coghill v. Kennedy*, 119 Ala. 641; *Schieffelin v. Schieffelin*, 127 Ala. 14; *Mullen v. Johnson*, 157 Ala. 262.

Undoubtedly if in any particular case where fraud or undue influence was alleged there was evidence both of actual deception or fraud practised upon the testator and of a dominating influence over his mind and will gained and exercised without resort to deception or to any underhand devices, it would be necessary by appropriate instructions to bring the attention of the jury to the distinction between these two methods of exerting an undue influence and thus controlling the action of a testator. But this does not appear to have been such a case.

Exceptions overruled.

**MICHAEL IWANOWSKI vs. AMERICAN AGRICULTURAL
CHEMICAL COMPANY.**

Suffolk. January 21, 1910. — February 25, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

In an action by a workman against his employer for personal injuries sustained by the plaintiff from being struck by a car which was run upon a track laid on a trestle and was used to bring the product of the defendant from the defendant's factory to its warehouse, if it appears from the plaintiff's evidence that the accident was caused by the negligence of a fellow servant of the plaintiff in starting the car before the signal for starting it had been given, and there is no evidence of a failure of the defendant to instruct this servant fully as to his duties or that the servant failed to comprehend the instructions given to him or that he was incompetent to do the work assigned to him, and if also there is no evidence that any negligence of the servant was known to the defendant or to its superintendent and no evidence of any negligence in continuing to employ him, a verdict must be ordered for the defendant.

TORT, for personal injuries received by the plaintiff when in the employ of the defendant at its fertilizer works at North Weymouth on February 17, 1905. Writ dated April 15, 1905.

In the Superior Court the case was tried before *Sherman, J.* The declaration contained five counts. The first count alleged a defect in the ways, works or machinery of the defendant; the second alleged negligence of a superintendent; the third alleged a failure to keep the machinery and appliances in proper condition and repair; the fourth alleged a failure properly to instruct the plaintiff or to warn him of the dangers of his employment; and the fifth, added by amendment, was as follows: "And the plaintiff says that on or about February 17, 1905, he was in the employ of the defendant; that it was the duty of the defendant to hire and retain in his service employees competent to do the work required; that the defendant wholly regardless of his duty in this respect, negligently and carelessly hired and retained in his employ a person to the plaintiff unknown who was incompetent and unskilful and unfit to do the work assigned him by the defendant; that all the foregoing was known, or in the exercise of due care ought to have been known, by the defendant;

that in consequence thereof the plaintiff was severely injured in body and mind and has suffered great loss in his earnings."

At the trial the plaintiff waived the first and third counts of his declaration.

The evidence relating to the defendant's liability consisted of the testimony of the plaintiff and that of one Mikis, called by the plaintiff as a witness. The following facts appeared:

At the defendant's works there were two buildings about three hundred yards apart, of which one was a factory for the manufacture of fertilizer and the other was a storehouse for its storage. A narrow gauge track on an elevated trestle about thirty feet in the air connected these buildings, and on this ran one car attached to an endless cable. The power was applied to the cable and the motion of the car was controlled by a lever near the track in the factory. In the storehouse at the side of the elevated track there was a platform, and on this platform were push buttons whereby an electric bell in the factory could be rung. By running the car back and forth fertilizer was carried from the factory to the warehouse. The duty of the witness Mikis was to fill the car in the factory from a chute and operate the car by the lever. The plaintiff's duty was to be on the platform in the storehouse, to receive and empty the car and to signal for its return by means of the electric bell. Three bells was the signal for the return of the car to the factory. The plaintiff testified that while he was at work emptying the car in the storehouse the witness Mikis started the car back towards the factory without having received any signal to do so from the plaintiff, and that thereby the plaintiff was thrown by the moving car from the track to the ground below, and was injured. It also appeared that about a day and a half before the accident both the plaintiff and Mikis had been put at work by a foreman named Muldoon to operate the car between the factory and storehouse; that they had been given certain instructions by Muldoon as to how to operate it, and thereafter had run the car for a day and a half up to the time of the accident. Both the plaintiff and Mikis testified that they were Poles and that when they were put at work by Muldoon they did not understand English and Muldoon did not speak Polish. There was evidence as to how and to what effect Muldoon instructed the plaintiff and Mikis and as

to what extent they understood him.. Both the plaintiff and Mikis testified that they knew that three bells was the signal for the return of the car.

On all the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions. An agreement of the parties was inserted in the bill of exceptions that if the exceptions were sustained judgment should be entered for the plaintiff in the sum of \$1,500.

W. W. Clarke, for the plaintiff.

R. B. Stone, for the defendant, was not called upon.

SHELDON, J. It appeared from the plaintiff's own showing that the accident by which he was injured was due to the negligence of Mikis in starting the car when he had not received the signal to do so. Mikis had been instructed and he understood that he was to do this only when he received the appointed signal, three bells. But he looked at the bell, saw it moving slightly, and inferred that it had so rung and that he had failed to hear it. So he started the car back by means of the lever, and the plaintiff was injured. There was no evidence of any failure to instruct Mikis fully as to his duties, or that he failed to comprehend exactly the instructions given him, or was at all incompetent to do the work assigned to him. Specific acts of mere negligence in doing his work did not tend to show such incompetence. *Cooney v. Commonwealth Avenue Street Railway*, 196 Mass. 11, 14. Nor was there any evidence that any negligence of his was known to the defendant or its superintendent, or that there was any negligence in continuing to employ him. *Gilman v. Eastern Railroad*, 18 Allen, 433, 444. The accident could not have been due to Mikis's ignorance of the English language, as in *Beers v. Isaac Prouty Co.* 200 Mass. 19. See *Friberg v. Builders Iron & Steel Co.* 201 Mass. 461. The plaintiff's counsel has not contended, and could not have contended, that the defendant could be found to have been negligent in any other respect.

Exceptions overruled.

**HANSON & PARKER, LIMITED, vs. C. J. WITTENBERG
& another.**

SAME vs. SAME.

**C. J. WITTENBERG & another vs. HANSON & PARKER,
LIMITED.**

Suffolk. January 21, 1910. — February 25, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Contract, Performance and breach, Rescission. Sale. Evidence, Competency. Damages, In contract.

Where there are two independent contracts between the same persons for the furnishing of certain goods of the same kind and quality at different times, the fact that the seller has committed a breach of the first contract by furnishing goods inferior to those required by the contract and by failing upon demand to furnish goods of the kind and quality required, does not justify the buyer in assuming that the seller also will break his second contract for a further supply of like goods, and, although the buyer may be reasonably apprehensive of a like breach of the second contract, he has no right to rescind or repudiate the second contract before it has been broken by the seller.

In an action for an alleged breach of a contract to furnish a certain commodity at an agreed price, upon the question whether the contract sued upon had been rescinded, evidence of the acts and declarations of the parties and of circumstances which might have furnished a motive for their conduct is competent, and, if it appears that there had been an advance in the price of the commodity or that it could not be obtained easily in the market, this may tend to show that it was not for the interest of the seller to insist upon performance, so that his silence, after a proposal of a rescission of the contract had been made to him by the buyer, until the time for performance had elapsed may justify a finding that he acquiesced in the proposal and that the contract was cancelled by mutual consent.

In an action for a breach of a contract to ship certain coal to the plaintiff in barges sent by the plaintiff to receive it, in delivering coal of a kind and quality inferior to that called for by the contract, and for a later breach in failing to deliver coal of the required kind and quality, if it appears that the defendant, when he shipped the part of the coal which was shipped to the plaintiff, knew that it was not the kind of coal which the plaintiff had purchased and had insisted on having and also knew that until the arrival of the coal the plaintiff would be ignorant of the substitution, and if it also appears that the defendant fully understood that the port of shipment was merely a place for transportation to other markets, and that upon the receipt of the coal at its port of destination it was to be resold by the plaintiff, and if it is shown that by a usage of the trade known to the parties the buyer does not inspect the coal when shipped in his vessels but is expected to rely upon the seller's promise to deliver coal of the quality called for by the contract, it would be unfair to limit the plaintiff's damages to the difference between the contract price and the market

price at the port of shipment, and the measure of damages must include not only the difference in price in the market at the plaintiff's place of business to which the coal was shipped and to be shipped, but also the expenses and the necessary disbursements incurred by the plaintiff by reason of the defendant's breach of contract.

THREE ACTIONS OF CONTRACT, the first two brought by Hanson and Parker, Limited, a corporation engaged in the wholesale coal business in Boston with a branch office in New York, against C. J. Wittenberg of New York, an agent for certain West Virginia coal mines, and the High Carbon Coal and Coke Company, one of these actions being for damages for an alleged breach of a contract to deliver to the plaintiff coal of a certain kind and quality and the other action being on an account annexed for \$1,483.58 for money paid for insurance, freight, towing and shifting, and the third action brought by C. J. Wittenberg and the High Carbon Coal and Coke Company against Hanson and Parker, Limited, with counts for the price of coal sold and delivered and for damages for a breach of contract in refusing coal on its delivery. Writs in the first two actions dated May 7 and May 23, 1900, and writ in the third action dated September 10, 1903.

By agreement of the parties the three cases were referred to Roland W. Boyden, Esquire, as auditor, and also by agreement of the parties C. J. Wittenberg and the High Carbon Coal and Coke Company were treated as one and the same person and were referred to as C. J. Wittenberg alone. Later the three cases were heard together by *Fessenden, J.*, without a jury, and the only evidence offered by either party was the auditor's report.

In the first two actions Hanson and Parker, Limited, sought to recover damages for the delivery of two cargoes of inferior coal which were accepted and paid for; for the non-delivery of the remainder of the coal called for by the first contract, three cargoes having been tendered and refused on account of their inferior quality; for expenses paid upon two of these cargoes; and for loss of profits upon resales of part of the coal. In the third action Wittenberg sought to recover damages for the failure of Hanson and Parker, Limited, to receive and pay for the entire quantity of coal specified in the two contracts.

Hanson and Parker, Limited, and Wittenberg entered into two contracts. The first, which was made on April 7, 1900, provided for the sale by Wittenberg to Hanson and Parker, Limited, of ten thousand tons of New River coal at \$2.50 a ton, f. o. b. vessel at Newport News, to be delivered five thousand tons in April and five thousand tons in May. The second, which was made on April 13, 1900, provided for a further sale of ten thousand tons of the same kind of coal at \$2.57 per ton, to be delivered five thousand tons in May and five thousand tons in June.

The auditor's report contained the following finding in regard to the custom in the coal trade: "The custom of the coal trade requires, in case of sales of coal for shipment f. o. b. Newport News, that the purchaser shall charter vessels to receive the coal at the railroad loading piers at Newport News, and shall notify the seller. The coal received from the mines by the railroad, and transported to its piers, is loaded in such vessels by the railroad upon instructions from the seller. A certain leeway is allowed either party upon a contract for a definite number of tons, a variation of five to ten per cent either way being permitted. The purchaser is not expected to inspect the coal at the time of loading."

The following facts and also others which are stated in the opinion appeared by the auditor's report:

Hanson and Parker, Limited, ordered from Wittenberg six cargoes of New River coal, amounting to about twelve thousand tons, and sent the vessels to Newport News to be loaded. Wittenberg loaded five of these vessels with an inferior grade of coal not New River coal. Hanson and Parker, Limited, paid for the first two cargoes, which arrived at Boston about April 27, and were broken into before it appeared that they did not contain New River coal. A custom of the coal trade prevents the return of a cargo by the buyer to the seller after bulk has been broken, and Hanson and Parker, Limited, retained the first two cargoes. At the time the quality of the coal in these cargoes was discovered, the third, fourth and fifth vessels were loaded, and had left Newport News for Boston. Hanson and Parker, Limited, then had the bills of lading for the third and fourth cargoes, but never received a bill of lading for the fifth cargo. At this time the sixth vessel had not arrived at New-

port News. As soon as the quality of the coal in the first two cargoes was discovered, Hanson and Parker, Limited, and Wittenberg had a conference, in which it appeared that the third, fourth and fifth cargoes consisted of coal like that in the first two vessels, and that Wittenberg could not deliver New River coal in accordance with his agreements. Hanson and Parker, Limited, thereupon refused to accept the third, fourth and fifth cargoes or any coal similar to them, sent the sixth vessel to another mine agent for her cargo, and cancelled the contract of April 13. Wittenberg took back the bills of lading for the third and fourth cargoes, did not tender that for the fifth, and acquiesced in the cancellation of the second contract.

The fair market value of New River coal at Boston was \$3.40 per ton between April 19 and May 10, 1900, \$3.35 per ton between May 10 and May 31, 1900, and \$3.25 per ton between June 1 and June 30, 1900, and at Newport News the fair market value was seventy-five cents per ton less. The fair market value of the inferior coal in the first two cargoes was \$2.40 per ton at Boston. There was no evidence of its value at Newport News. Hanson and Parker, Limited, paid out in necessary expenses upon the third and fourth cargoes, which were sold by Wittenberg for his own benefit, the sum of \$1,453.07.

At the close of the evidence, as contained in the auditor's report, C. J. Wittenberg asked the judge to make the following findings and rulings, which were disposed of by the judge as stated after each:

"1. Where two contracts between the same two parties are distinct and to be performed at different times, the non-performance of one is no defense to an action on the other." This ruling was made by the judge.

"2. The contract of April 13th was a different and separate contract to that of April 10th." This ruling was made by the judge.

"3. No failure on the part of Wittenberg to perform the contract of April 10th afforded a right to Hanson and Parker, Limited, to refuse to perform the contract of April 13th." This ruling was made by the judge.

"4. Hanson and Parker, Limited, had no right to require Mr. Wittenberg's assurances as to the manner of his performing

the contract of April 13th before the time of performance had arrived according to the terms of said contract.

“5. Wittenberg was not obliged to give any assurances or make any promises as to his manner of performing the contract of April 13th at any time before the time for performance on his part had arrived according to the terms of said contract.”

As to requests 4 and 5 the judge found and ruled that Hanson and Parker, Limited, was justified in calling for assurances from Wittenberg.

“6. Where contracts for the sale of personal property are broken, by a vendor failing to deliver the property according to the terms of the bargain, the measure of damages is the difference between the contract price and the market price of the article at the time when and the place where it should have been delivered.” As to this request the judge ruled that, although it stated the general rule correctly, the present case did not come within that general rule.

“7. The measure of damages for the failure of Wittenberg to deliver the coal to Hanson and Parker, Limited, is the difference between the contract price and market price at Newport News at the various times when it was his duty to deliver it.” Refused.

“8. Where coal has been accepted and delivered by Wittenberg to Hanson and Parker, Limited, under these contracts, if the coal delivered did not comply with the terms of the contract, the measure of damage is the difference between the value of the coal delivered at the place and time when it was so delivered, and the value of the coal which should have been delivered according to the terms of the contract.” Refused.

“9. The measure of damages to be awarded to Hanson and Parker, Limited, for failure to deliver coal according to contract in barges 11 and 16,* is the difference between the price of New River coal at Newport News at the time of the loading of said barges and the value or market price of the coal actually delivered in said barges.” Refused.

“10. There being no evidence as to the value of the coal delivered at Newport News the court cannot award any damages to Hanson and Parker, Limited, upon the cargoes in barges 11 and 16.” Refused.

* These barges arrived at Boston where the coal was unloaded.

"11. The market price of New River coal and other coals in Boston is immaterial and furnishes no measure of damages in this case." Refused.

"12. The measure of damages for failure of Wittenberg to deliver coal to Hanson and Parker, Limited, is the difference between the contract price and the market price of New River coal at Newport News." Refused.

"13. The measure of damages with reference to the cargoes in barges 11 and 16 is the difference between the market value at Newport News of the coal actually delivered, and the market value of New River coal, and there being no evidence as to such difference, there can be no recovery as to the coal delivered in barges 11 and 16." Refused.

"14. Hanson and Parker, Limited, are not entitled to recovery for loss of profits." This was found and ruled by the judge.

The requests numbered from 15 to 19 inclusive related to loss of profits, and were ruled by the judge to be immaterial in view of his finding and ruling upon request 14.

"20. Hanson and Parker, Limited, are not entitled to recover any of the expenses incurred by them in connection with the coal after it left Newport News." Refused.

The requests from 21 to 29 inclusive were for rulings that Hanson and Parker, Limited, were not entitled to recover damages against Wittenberg under any of nine different items of the auditor's report. Each of these requests was refused.

"30. Even if the court should find that the two letters of April 10th and April 13th constituted but a single contract between Hanson and Parker, Limited, and Wittenberg, then the same was a divisible contract, and a failure of the vendor to deliver the coal on certain instalments of the contract in accordance with the terms thereof is not such a breach of the entire contract as to excuse the vendee from taking and paying for the coal on the remaining instalments." Ruled to be immaterial in view of the finding and ruling under request 2.

"31. Wittenberg is entitled to recover as damages the difference between the contract price and the market at Newport News on ten thousand tons of coal which Hanson and Parker, Limited, refused to accept and pay for in accordance with the order of April 13th." Refused.

" 32. The contract of April 13th has never been cancelled." Refused.

The judge found for the plaintiff Hanson and Parker, Limited, in the sum of \$5,944.09 as damages in the first action and in the sum of \$2,270.79 as damages in the second action, and found for the defendant Hanson and Parker, Limited, in the third action.

In assessing damages, the judge allowed Hanson and Parker, Limited, in the first action the difference between the values at Boston of the coal delivered in the first two cargoes and of New River coal, and the difference between the value of New River coal at Boston and the contract price plus the cost of transportation of the amount of coal in the third, fourth and fifth cargoes; and in the second action he allowed the expenses paid by Hanson and Parker, Limited, upon the third and fourth cargoes.

To the refusals to find and rule as requested and to the findings and rulings made by the judge, C. J. Wittenberg alleged exceptions.

L. M. Friedman, for Wittenberg.

A. B. White, for Hanson and Parker, Limited.

BRALEY, J. The only evidence introduced at the trial was the auditor's report, and, his findings of fact evidently having been affirmed by the judge who tried the case without a jury, the questions raised by the exceptions rest upon the refusals to rule, and the rulings, as to the effect of the evidence. *Beers v. Wardwell*, 198 Mass. 236. During the period covered by the transactions the plaintiff corporation was engaged as a jobber in selling coal at wholesale, with its principal office in Boston. If occasional sales were made elsewhere, the bulk of its trade was supplying customers within the territory of which that city, as described in the report, is the usual commercial centre of distribution. After verbal negotiations, it entered into two contracts in writing with the defendant Wittenberg, who resided and did business in another State, for the delivery of ten thousand tons of "steam coal" under each contract. The coal was to be delivered at Newport News, Virginia, by the railroad as directed by the seller, free on board vessels sent by the buyer, by whom the expenses of transportation were to be paid. By the first contract an option as to the kinds of coal was given, and, although the second contract omits this clause, the auditor

reports, that the plaintiff contracted only for "New River coal," which the defendant engaged to furnish.

In the performance of the first contract, the defendant concedes that the shipments were not of the kind selected, but the cargoes were composed of a mixture of New River coal and Kanawha coal, in which the latter largely predominated. Upon the arrival of the first cargo, a part was discharged before the plaintiff ascertained its inferior quality. Interviews followed between the parties, but no adjustment of their differences was reached, and, the defendant's agent having stated that the remaining cargoes in transit were similar, the plaintiff notified the defendant that it would not accept them. Because of the failure to comply with the terms of the first contract, the corporation recalled the vessel it had sent for the small balance remaining of the first purchase and for the coal to be shipped under the second contract, and alleged as a defense in the action against it by Wittenberg for damages for the refusal to perform, that this contract had been cancelled.

The contracts, as the judge ruled, no doubt were distinct and not dependent. *Turner v. Rogers*, 121 Mass. 12. If the first had been broken by the seller, it did not follow he would commit a breach of the second contract, although a refusal to perform would have justified an immediate rescission by the plaintiff. *Daniels v. Newton*, 114 Mass. 530, 533. *Menage v. Rosenthal*, 187 Mass. 470. But, while the defendant's conduct tended strongly to weaken confidence in his intention to keep a similar agreement in the future, the plaintiff's anticipation of non-performance, however reasonable under the circumstances, would not have been a justification for its rescinding or repudiating the second contract. *Porter v. American Legion of Honor*, 183 Mass. 326.

An executory bilateral contract, however, may be rescinded or cancelled by mutual consent of the parties. They may discharge it in part by a new agreement modifying its terms, or agree to abrogate it so that both will be discharged from performance. The original consideration supports the modification, while the agreement of each to annul is a sufficient consideration for an abandonment. *Earnshaw v. Whittemore*, 194 Mass. 187, 191, and cases cited. *Cutter v. Cochrane*, 116 Mass. 408, 410. But

where, as in the present case, the parties are not in accord as to what was done, the question whether they have reached such an understanding is one of fact. *Johnson v. Reed*, 9 Mass. 78, 84. *Cutter v. Cochrane*, 116 Mass. 408, 410. *Hobbs v. Columbia Falls Brick Co.* 157 Mass. 109. In proof of consent to rescission, it is competent to show acts, declarations and motives of the parties. If it appears that there has been an advance in price, or that the commodity cannot be obtained easily in the market, these facts may furnish evidence that it was not for the interest of the seller to insist upon performance. *Smith v. Glover*, 50 Minn. 58. *Chouteau v. Jupiter Iron Works*, 94 Mo. 388. The auditor, who saw the witnesses and heard the evidence, reports that although Wittenberg neither expressly assented nor dissented, he did not protest at the time, but remained silent until the period of performance had elapsed. In the meantime, the market price had advanced beyond the contract price, and New River coal had become scarce, or could not be obtained. In view of his attitude and these conditions, the auditor finds that the seller acquiesced, and that the second contract was cancelled by mutual consent. The judge, having been warranted in finding accordingly, rightly refused to give the plaintiff Wittenberg's thirty-first and thirty-second requests, and, having found for the defendant, the fourth and fifth requests became immaterial.

The remaining exceptions relate wholly to the measure of damages recoverable in the actions for failure to perform the first contract. The ordinary rule, which often has been stated, is that where the seller fails to deliver, the buyer can recover for breach of the promise the difference between the contract price and the market value at the place of delivery of the goods, wares or merchandise at the time the contract is broken. In mercantile transactions this difference generally will measure the actual loss sustained. But as damages are assessed as compensation, the amount awarded should be such as the parties at the time of the making of the contract are supposed to have contemplated naturally would follow from the probable consequences of a breach. *Merrimack Manuf. Co. v. Quintard*, 107 Mass. 127. *Abbott v. Hapgood*, 150 Mass. 248. *Edgar v. Joseph Breck & Sons Corp.* 172 Mass. 581. *Speirs v. Union*

Drop Forge Co. 180 Mass. 87. *Weston v. Boston & Maine Railroad*, 190 Mass. 298. *Leavitt v. Fiberloid Co.* 196 Mass. 440, 445, 446. *Boyden v. Hill*, 198 Mass. 477. *C. W. Hunt Co. v. Boston Elevated Railway*, 199 Mass. 220. And this may be proved by parol evidence, even if the contract is in writing. *Globe Refining Co. v. Landa Cotton Oil Co.* 190 U. S. 540, 544. A recurrence to the evidence makes it plain that the port of shipment was designated only as a place for transportation to such other markets as the buyer might direct, and the defendant fully understood that upon receipt at the port of destination the coal was to be resold by the plaintiff. By a general usage of the trade, which the auditor reports was known to the parties and which consequently was incorporated in the contract, the buyer does not inspect the coal when shipped, but is expected to rely upon the seller's promise to deliver coal of the quality called for by the contract. *A. J. Tower Co. v. Southern Pacific Co.* 184 Mass. 472, 475; *S. C.* 195 Mass. 157. While it might rely on the presumption that the defendant would not violate his agreement, the plaintiff was not bound upon the arrival of the cargoes to accept the coal if it was not the kind purchased, and it is immaterial whether title passed when it was put on board the vessels. If it did pass, as the defendant assumes, the sale nevertheless was on an implied warranty that the coal should be of the quality ordered. *Alden v. Hart*, 161 Mass. 576. *Fullam v. Wright & Colton Wire Cloth Co.* 196 Mass. 474. See *Kemensky v. Chapin*, 193 Mass. 500, 506; *Farrell v. Manhattan Market Co.* 198 Mass. 271; *West End Manuf. Co. v. P. R. Warren Co.* 198 Mass. 320. It is abundantly shown that the defendant, not only knew that the coal he directed the railroad to deliver was not the kind purchased and which under the option the plaintiff insisted upon having, notwithstanding his representations that Kanawha coal was equally serviceable, but also knew that until the arrival of the coal the plaintiff would be ignorant of the deception. The market value, at the time the coal arrived and was ready for sale in the ordinary course of its trade, is what it would have been worth to the plaintiff. To limit the plaintiff's recovery to the difference between the purchase price and the market price at the port of shipment, would enable the defendant to escape without making full compensation for the losses directly attributable to his

violation of the agreement. The measure of damages assessed by the judge, therefore, was rightly held to include, not only the difference in price in the market at the plaintiff's place of business, but also the expenses and other necessary disbursements incurred in transportation, as stated and allowed by the auditor in his schedule of items. *Cutting v. Grand Trunk Railway*, 13 Allen, 381, 384, 385. *Johnston v. Faxon*, 172 Mass. 466. *Leavitt v. Fiberloid Co.* 196 Mass. 440. *C. W. Hunt Co. v. Boston Elevated Railway*, 199 Mass. 220. *Maryland Ice Co. v. Arctic Ice Machine Manuf. Co.* 79 Md. 103, 107. *O'Connor v. Forster*, 10 Watts, 418. *Western Union Telegraph Co. v. Hall*, 124 U. S. 444. *Howard v. Stillwell & Bierce Manuf. Co.* 139 U. S. 199, 206.

We find no error of law at the trial, and the exceptions must be overruled.

So ordered.

ELLEN FEELEY vs. CITY OF MELROSE.

MARGARET E. STEVENS vs. SAME.

WALTER L. SHEPARD COMPANY vs. SAME.

Middlesex. January 24, 1910. — February 25, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Way, Defect in highway. Automobile. Negligence. Practice, Civil, Exceptions, Actions tried together, Verdict. Evidence, Presumptions and burden of proof.

No action can be maintained against a city for injuries received, while being driven in an automobile, by reason of a defect in a highway of the defendant, if the negligence of the driver of the automobile contributed to the accident, regardless of the relation of the plaintiff to the driver and of any question of imputed negligence; because in such a case the defect in the way could not be found to be the sole cause of the injury, which under our decisions is necessary for a recovery under the highway act. The same rule applies to an action by the owner of the automobile for injury to his property.

In an action against a city for personal injuries received, while the plaintiff was being driven in an automobile, by reason of a defect in a highway of the defendant, an exception to a refusal of the presiding judge, to rule that the plaintiff could not recover if the driver of the automobile was not in the exercise of due care, will not be sustained although the ruling asked for was correct, if the refusal has been made immaterial by a verdict of the jury for the plaintiff in another action brought by the owner of the automobile and tried at the same time, which under the instructions given establishes the fact that the driver of the automobile was not negligent.

In an action against a city for personal injuries received, while the plaintiff was being driven in an automobile, by reason of a defect in a highway of the defendant, a refusal of the presiding judge, to rule that if a defect in the automobile contributed to the accident the plaintiff could not recover, will not be sustained although the ruling asked for was correct, if the refusal has been made immaterial by a verdict of the jury for the plaintiff in another action brought by the owner of the automobile and tried at the same time, which under the instructions given establishes the fact that a defect in the automobile did not contribute to the accident.

A person who is being driven upon a highway in an automobile which is not registered as required by law is not a traveller lawfully upon the way within the meaning of the highway act, and if he is injured by reason of a defect in the highway he cannot recover from the city or town maintaining it.

Under St. 1903, c. 478, § 1, as amended by St. 1906, c. 311, § 2, and St. 1906, c. 412, § 8, the registration of an automobile expires upon a transfer of ownership, and an automobile which after such a transfer bears the number of its former registration and no other, cannot be lawfully upon a highway.

In actions against a city, for personal injuries received by reason of a defect in a highway of the defendant while the plaintiff was being driven thereon in an automobile, and by the owner of the automobile for injury to his property, where the defense relied upon is that the automobile was not registered and numbered as required by law and therefore was upon the highway unlawfully, the burden of proving this fact is upon the defendant; but, if the defendant introduces evidence that the automobile was duly registered by a former owner, that this registration had expired about three months before the accident, and that the car still bore the number of the old registration, and the plaintiffs, of whom one is the owner, put in no evidence of any later registration, it cannot be said as matter of law that the evidence of the defendant may not be found by the jury to be sufficient to sustain the burden of proof upon this issue.

THREE ACTIONS OF TORT, two for personal injuries alleged to have been sustained by reason of an automobile in which the plaintiffs Stevens and Feeley were passengers running into an open trench in Franklin Street, a public highway of the defendant, on the evening of July 5, 1907, and the third action by the owner of the automobile for injury to his property. Writs dated November 29, 1907.

In the Superior Court the cases were tried together before *Hitchcock, J.* The jury took a view of the scene of the accident.

There was evidence on the part of the plaintiffs tending to show that at about 11.30 P. M. on the evening of the accident, the plaintiffs Stevens and Feeley, in company with one Charles M. Boyce, who testified as a witness for the plaintiffs, were walking to their homes in Stoneham, and that, when they had arrived at a point on Franklin Street in Stoneham near the Stoneham station of the Boston and Maine Railroad and

distant somewhat over a mile from the scene of the accident, they met some friends of the plaintiffs Stevens and Feeley who were alighting from an automobile driven by one Brooks, who was called as a witness for the plaintiffs and testified on behalf of the plaintiffs. These friends asked Brooks to give the plaintiffs Stevens and Feeley and Boyce, all of whom were strangers to Brooks, a ride in the automobile. Brooks told these plaintiffs that he then was going directly to the garage of the plaintiff the Walter L. Shepard Company; that he was in a hurry to get there, and had just enough gasoline to furnish power for that distance, and that he would take them in the car if they cared to go where he was going himself, but would not take them back from the garage after getting there. Thereupon the plaintiffs Stevens and Feeley and Boyce entered the automobile, which proceeded down that part of Franklin Street lying in Stoneham to the point of the accident. Brooks, the plaintiffs and Boyce all testified that Brooks alone operated the car; that the plaintiffs did not direct him where to go; that they had no control over him in the operation or management of the automobile; that Brooks started immediately for the garage of the Walter L. Shepard Company, and was proceeding directly there at the time of the accident; that the plaintiffs Stevens and Feeley, and also the witness Boyce, accompanied him as his guests without charge on his part and with no authority to direct or control his operation of the car on their part.

The automobile was owned by the plaintiff the Walter L. Shepard Company, and Brooks was a chauffeur employed by that plaintiff. He was duly licensed as a chauffeur and had had several years' experience in the operation of automobiles, during the greater part of which time he had been employed as a chauffeur by the Walter L. Shepard Company.

The evidence in regard to the registration of the automobile is described in the opinion.

At the close of the evidence the defendant asked the judge to rule as follows:

"1. Upon all the evidence the plaintiffs are not entitled to recover.

"2. There was no evidence which would warrant the jury in finding that the way was defective."

"5. If the jury find that the driver Brooks was not in the exercise of due care, the plaintiffs are not entitled to recover.

"6. If the jury find that the plaintiffs Stevens and Feeley trusted to Brooks the sole care and operation of the automobile in which they were riding, and relied wholly upon the care and vigilance of Brooks and he was negligent, the said plaintiffs are not entitled to recover.

"7. If the jury find that the plaintiffs Stevens and Feeley continued to ride a considerable distance with Brooks after he had operated the automobile at a speed so great as to cause them to scream with fright, they cannot recover.

"8. If the jury find that the plaintiffs Stevens and Feeley accepted an invitation to ride in an automobile late at night with a person whom they did not know and of whose care and skill they had no knowledge and his negligence contributed to the injury, the said plaintiffs are not entitled to recover.

"9. If the jury find that the automobile in which the plaintiffs were riding was not registered according to the requirements of law, the plaintiffs are not entitled to recover.

"10. If the jury find that the ownership of the automobile registered under the number which was upon the automobile in suit had changed before July 5, 1907, and the number had not been reissued, the plaintiffs cannot recover.

"11. If the jury find that the brake upon the automobile was defective or failed to work properly, and this contributed to the cause of the accident, the plaintiffs are not entitled to recover."

"13. If the plaintiffs Stevens and Feeley saw the lanterns in the street sixty or more feet away and did not watch them or call Brooks' attention to them, they were guilty of contributory negligence and cannot recover.

"14. If the jury find that the number upon the machine was not the dealer's number, 0408, issued to the W. L. Shepard Company, the plaintiffs cannot recover."

The judge refused to make these rulings except that he gave the eleventh ruling as an instruction in the action of the Walter L. Shepard Company, and also gave in substance the fifth ruling as an instruction in that action. The defendant objected to a portion of the judge's charge which allowed the jury to find that the plaintiffs Stevens and Feeley were not precluded from recov-

ering by negligence on the part of the driver Brooks. The judge declined to change or modify this instruction. "No instructions were given relative to the evidence as to registration of the automobile and numbers upon it."

The jury returned a verdict for the plaintiff in each of the cases, in the action of Feeley in the sum of \$3,000, in the action of Stevens in the sum of \$500, and in the action of the Walter L. Shepard Company in the sum of \$150. The defendant alleged exceptions.

C. L. Allen, for the defendant.

W. J. Corcoran, (*M. F. Cunningham* with him,) for the plaintiffs.

SHELDON, J. In our opinion the fifth and sixth requests should have been given in each one of the cases. If the injury to the individual plaintiffs was due in part to the negligence of Brooks in driving the automobile, then it could not be said that the defect in the highway was the sole cause of their injury within the meaning of our decisions. *Kidder v. Dunstable*, 7 Gray, 104. *Shepherd v. Chelsea*, 4 Allen, 113. *Pratt v. Weymouth*, 147 Mass. 245, 252. *Block v. Worcester*, 186 Mass. 523. This would not be a case where the concurring cause of the injury was the merely innocent act of a third party, as in *Hayes v. Hyde Park*, 153 Mass. 514, and *Clinton v. Revere*, 195 Mass. 151. It is not because the negligence of Brooks is to be imputed to these plaintiffs that they fail of recovery, (*Shultz v. Old Colony Street Railway*, 193 Mass. 309,) but because by reason of that negligence, although they are not responsible for it, it could not be found that the defect in the way was the sole cause of the injury.

But as the case has turned, the defendant has not been harmed by this error. The fifth ruling asked for was given in the case of the Shepard Company, and the finding of the jury in favor of the plaintiff in that case establishes the fact that Brooks was not negligent. This exception cannot be sustained. And what we have said applies also to the eleventh request.

If the automobile in which the female plaintiffs were riding was not registered according to the requirements of law, it was unlawfully upon the way; those who were using it were not travellers but trespassers; and it would follow that they could

not maintain this action. *Doherty v. Ayer*, 197 Mass. 241, 247. *Dudley v. Northampton Street Railway*, 202 Mass. 443. Each one of the plaintiffs must fail of recovery in that event. It would not help the individual plaintiffs that they may not have known that the automobile was not duly registered; they did not know that it was, and it was at their own peril, as to the city and as to third persons, that they undertook to use a vehicle the use of which was prohibited by law. It follows that the ninth and tenth requests for instructions should have been given, if there was evidence on which the jury could have found the facts therein stated. And we are of opinion that the jury could so have found.

There was evidence that the number upon this machine was 13,627, and that the only automobile which had been registered under that number was a machine like this which had been registered in the name of one Eames, but which he had ceased to own on March 20, 1907. The accident happened on July 5, 1907. The statute in force on March 20 was St. 1903, c. 473, § 1, as amended by St. 1905, c. 311, § 2, and St. 1906, c. 412, § 8. It was further amended before the date of the accident by St. 1907, c. 580, § 1; but this amendment contained nothing which bears upon the question before us and may be disregarded. The statute provided that "upon the transfer of ownership of any automobile or motor cycle its registration shall expire." Accordingly it could have been found that the registration of this machine had expired on March 20, and yet that it still bore the number of that former registration. And the plaintiffs, although their attention was thus called to the matter, offered no evidence of any new registration or to show that a new official number had been assigned to the machine. Brooks in rebuttal testified that it was running "by Mr. Shepard's number," but that he could not tell what that number was or what number was on the machine.

Undoubtedly, it was for the defendant to show that the machine was not duly registered and numbered. *Doherty v. Ayer*, 197 Mass. 241. But we cannot say as matter of law that evidence that it had been duly registered, that this registration had expired about three months before the accident, and that the machine still bore the number of the old registration, did not

tend to prove this fact, especially when the plaintiffs, one of whom was the owner of the machine, put in no other evidence upon the question than the testimony of Brooks, which we have referred to. Accordingly, we are of opinion that the ninth and tenth requests should have been given.

The first request was rightly refused. The questions in the case were for the jury. Nor do we find any error in the rulings excepted to other than what has been stated. *Woods v. Boston*, 121 Mass. 337. *Flynn v. Watertown*, 173 Mass. 108. *Leonard v. Boston*, 183 Mass. 68.

Exceptions sustained.

NEW ENGLAND SANITARIUM vs. INHABITANTS OF STONEHAM.

Middlesex. November 18, 1909. — February 28, 1910.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Tax, Exemption. Charity.

The charter of a corporation stated that it was organized "for the purpose of founding a hospital or charitable asylum . . . for the care and relief of indigent or other sick or infirm persons, at which institution may be received also patients and patrons who are able to and who pay for the benefits therein received and which institution shall devote the funds and property acquired . . . exclusively to maintain itself, improving its conditions and facilities, extending its benefits and usefulness and facilitating and promoting its purposes by such sanitary, dietetic, hygienic and philanthropic reforms and efforts as are germane or auxiliary thereto. All of its said purposes being undenominational, non-sectarian, philanthropic, humanitarian, charitable and benevolent and in no manner directly or indirectly for profit or dividend paying to any one." The corporation, from contributions, supplemented by loans and mortgages from friends, purchased land, built thereon several buildings and conducted a modern sanitarium with physicians, nurses and attendants. Besides the sources above mentioned, the expense of maintenance was paid by sums paid by various patients and others who came to visit patients. During the year 1907, one and seven one hundredths per cent of those who received accommodations were free patients, four and seven one thousandths per cent were part paying patients, and the rest paid the full rate named in an advertised schedule which ranged from \$12 to \$35 per week. None of the officers of the corporation, except the treasurer, who also was the manager, received any remuneration. Free patients, before they were admitted, had to be passed upon by a committee as to their character and financial standing. *Held*, that the personal property and real estate of the corporation was exempt from taxation under the provisions of R. L. c. 12, § 5, cl. 3, which exempts from taxation the personal property of benevolent and charitable institutions and such of its real estate as is owned and occupied by it for the purposes for which it was incorporated.

PETITION to the Superior Court, filed on March 24, 1908, under R. L. c. 12, § 78, on appeal from a decision of the assessors of the town of Stoneham refusing to abate a tax assessed upon the real estate and personal property of the petitioner for the year 1907, the petitioner contending that it was a charitable or benevolent institution and therefore that it was within the provisions of R. L. c. 12, § 5, cl. 3, and entitled to an exemption from taxation. The petitioner had paid the tax under protest.

The petition was referred to Marcus Morton, Esquire, as commissioner under R. L. c. 12, § 80. The report of the commissioner, besides the findings of facts and rulings of law stated in the opinion, contains the following findings of fact:

"The petitioner's real estate in Stoneham, valued at \$100,000, consisted of about forty-two acres of land upon which there have been erected a large main building, a large annex, three cottages or dormitories, a barn for livery and boarding accommodations and several other buildings. The main building, which was especially constructed for a sanitarium, has sixty-five rooms for patients and physicians and for treatment of patients, is supplied with an elevator, is heated by steam, contains electric lights, call bells, telephones and baths. There are twelve corner rooms provided with private baths and toilet and private telephones. The annex, so called, is used for nurses' rooms, nurses' class rooms, chapel, gymnasium, a large parlor and a number of rooms fitted up for patients' rooms. In the basement of this building are the treatment rooms, in which are various kinds of baths for massage and electrical treatment. One of the cottages is used for the residence of the superintendent and nurses' rooms and the other cottages are used for patients and nurses' rooms. In all there are seventy-eight patients' rooms. There are no large ward rooms but there are four small rooms which accommodate three or four patients each. The patients had access to a gymnasium which was maintained upon the premises, there being also conducted gymnasium classes and free lectures held once or twice every week on medical and health topics by the physicians. The land upon which the buildings stand is used for lawns, gardens, vegetable gardens and pasture for cows, all of which purposes are in connection with the work of the sanitarium. The grounds

also have upon them golf links for the use of those who come to the sanitarium, which were constructed by one of the patients.

"In 1907, the staff in charge of the institution consisted of a superintendent, a male physician, lady physician and superintendent of a training school for nurses. There was also a head nurse both for ladies and gentlemen, between forty and fifty nurses, a steward, a business manager, several call boys, book-keeper, stenographer, engineer, fireman, housekeeper, matron and half a dozen outside workers," most of whom received some remuneration. A nurses' school was conducted, the students "being trained to become missionary nurses for the purpose of combining the care of the sick with religious work for the poor, the course of training being three years."

"The petitioner furnished free of charge the services of both nurses and physicians to help care for the indigent sick among the Hebrews in Boston. They also paid the travelling expenses and furnished medicines without charge in connection with the services."

"The petitioner advertised in medical journals and issued for circulation a pamphlet descriptive of the institution and its methods. The pamphlet contained an attractive description in detail of the grounds and buildings and various conveniences and appliances adapted to the comfort and health of those in the institution. It described the work of the institution as a 'Physiological Method' which recognized that nature was the real physician and educated patients out of a morbid state into a condition of health, and taught them how to live in harmony with nature. It invited to the institution chronic invalids, as well as cases of recent or acute illness, excluding contagious, incurable, insane and epileptic cases. It also invited those who were tired out and required only rest and mental diversion, offering to receive them for the cost of board and room, without treatment, at reasonable rates when the accommodations would permit. The rates for room, board and treatment were stated. . . . The pamphlet stated that the lowest rates were less than actual cost and were offered to those of restricted financial circumstances and that further consideration would be shown to worthy persons who could not afford to pay anything for medical services by giving treatment of such cases as were properly recom-

mended without charge for medical attention and treatment, a small charge being made to cover the actual cost of board and special nurses. As accommodations as stated for this class were necessarily limited to the surplus earnings of the institution which were not required for improvements and repairs, correspondence was demanded in advance with reference to them. Discounts from regular rates for treatment were offered to physicians, clergymen and missionaries, and members of their families depending upon them, on rooms of \$15 and upwards, but no discount was offered on the price of board. Worthy objects of charity, it was stated, would receive consideration but could only be received by previous arrangement. The pamphlet also stated that the work of the institution was established as a philanthropic enterprise and that the funds for starting it were raised from friends and donated to the work, none of the contributors receiving any return therefrom, and that under its charter all earnings not needed for expenses, improvements and medical appliances, were to be devoted to benevolent work.

"The institution admitted and provided for three classes of occupants, — permanent, boarding and transient. Permanent or patient class stayed some length of time, at least one half a week; a transient spent the night or took a treatment or had a meal. Only about half of the transients received treatment. Boarders were friends of patients who helped care for them and others who came for the benefit of the board. They received no treatment. These three classes were again divided into those who paid in full, those who paid in part, and those who paid nothing." Of those who received accommodations at the institution during the year 1907, 1.07% were free patients, 4.007% were part paying patients, and 65% were included under the designation "transient and board paying patients."

"The names of those who applied for free service or requested a deduction from the regular rate were referred to a committee which inquired into the worthiness of the case and the financial standing of the applicant. It was the purpose of the institution to receive such applicants if and when the surplus earnings not required for improvements and repairs permitted. It actually, however, took some of them at times when the surplus did not warrant such a cost.

"The institution received an initial endowment of \$22,000 and has also raised by loans and mortgages, principally from friends, and at a low rate of interest, \$54,803, all of which amounts have been expended upon the property. It has also received from friends of the institution towards running expenses, donations of \$7,762 during the years from 1901 to 1908.

"Its principal revenue, however, has been derived from the fees charged for services amounting during the same years to \$266,179. The rates charged depended upon the nature of the accommodations furnished and ran from \$50 to \$20 a week for suites with private baths to \$14 and \$12 a week for rooms in the wards including treatment; and for board and room without treatment from \$16 to \$8 a week for adults and from \$7 and \$3 a week for children.

"All the revenue was used for the work of the institution as stated. No profit or financial benefit accrued to any officer, member of the corporation or incorporator, except the treasurer who was also business manager. They gave their services free. Very many of those who are in the service of the institution and receive pay for their services accept less than the services are reasonably worth because of their interest in the work."

The petition was heard by *Hardy, J.* The only evidence was the commissioner's report and the pamphlet and list of figures therein referred to. The judge found in accordance with the conclusions of fact and rulings of law in the commissioner's report, which are stated in substance in the opinion, ruled that the petitioner was not entitled to an abatement and by agreement of the parties reported the case for determination by this court, judgment to be entered for the petitioner for the tax assessed and paid by it with interest, if the court should be of the opinion that it was entitled to an abatement; otherwise, judgment to be entered for the respondent for costs.

J. A. Lowell, (L. Hill with him,) for the respondent.

O. Storer, for the petitioner.

BRALEY, J. The exceptions to the denial of the motion to dismiss having been waived, the report of the presiding judge presents for decision the question, whether the real and personal property of the petitioner, upon which the respondent assessed and collected a tax, was exempt under the provisions of R. L. c. 12,

§ 5, cl. 3. The petitioner was incorporated, "for the purpose of founding a hospital or charitable asylum within the State of Massachusetts for the care and relief of indigent or other sick or infirm persons, at which institution may be received also patients and patrons who are able to and who pay for the benefits therein received and which institution shall devote the funds and property, acquired and received by it from time to time and from all sources, exclusively to maintain itself, improving its conditions and facilities, extending its benefits and usefulness and facilitating and promoting its purposes by such sanitary, dietetic, hygienic and philanthropic reforms and efforts as are germane or auxiliary thereto. All of said purposes being undenominational, non-sectarian, philanthropic, humanitarian, charitable and benevolent and in no manner directly or indirectly for profit or dividend paying to any one." The report states very fully the endowment and financial resources of the corporation, and the details of its management in the reception and care of the classes of patients who were admitted. It appears that the land and buildings with their furnishings and equipment as a hospital were paid for by contributions supplemented by loans and mortgages from friends; and the entire income from all sources is spent in furtherance of the purposes of the institution, while the members and officers, with the exception of the treasurer, give their services. In its advertisements in medical journals, and in the pamphlet descriptive of the institution and its methods, while the graduated cost of board and expenses of medical services and nurses were given, a statement of its charitable character, and that under its charter all earnings not needed for expenses, improvements and medical appliances were to be devoted to benevolent work, also appears. It invited at different prices those who needed rest with mental diversion and chronic invalids for treatment, while excluding persons suffering from contagious or incurable diseases or who were insane or epileptic. If those who applied for free treatment, or for a reduction from the regular rates were not admitted until a committee had passed upon the character and financial standing of the applicant, a regulation of this nature was not only reasonable, but necessary to prevent imposition. In his summary of the work accomplished during the six years of its domicile in the town, the commissioner

states that of the entire number of patients admitted by far the larger part were paying patients, but it also appears that the expenses in some years were so increased by caring for free patients and those who could not pay in full, and by disbursements for outside charitable work, that a deficit resulted.

The commissioner, while not explicitly separating his findings of fact from his rulings of law, upon which the judge affirmed and ordered judgment for the respondent, leaves no doubt as to the grounds upon which he refused to rule as requested by the petitioner, that it was a charitable corporation. They appear in these paragraphs which follow the findings of fact: "The plaintiff was not run as a public hospital under obligation to receive and care for at any time the indigent and sick. While it intended mainly to care for the sick it might fill up its rooms with those who were not sick in the ordinary meaning of the word and who could pay for benefit received. It in fact received a large number of this class. It was run rather as a health resort which, while its purposes were humanitarian, did not necessarily or primarily help to relieve the community of its burden of caring for the indigent and sick."

It may be conceded that a trust for the exclusive benefit of the least wealthy of a well to do or prosperous class could not be sustained as a charity under the St. of 48 Eliz. c. 4. *Attorney General v. Northumberland*, L. R. 7 Ch. D. 745. But the controlling purpose may be none the less charitable, even if those who need no pecuniary aid are either directly or indirectly benefited. A hospital established for the free treatment of poor patients may receive payments from rich persons who are permitted to avail themselves of its benefits. Every charity created for the gratuitous treatment and relief of disease, or the physical infirmities of the indigent, or other purposes enumerated in this statute, or if not enumerated, which are held to come within its spirit and intendment, in a large sense helps and aids the community, without regard to the social rank or pecuniary condition of its members. Lord Camden in *Jones v. Williams*, Amb. 651, tersely defined a charity to be, a "gift to a general use, which extends to the poor as well as the rich," and this definition has been amplified, approved and followed in *Drury v. Natick*, 10 Allen, 169, *Jackson v. Phillips*, 14 Allen, 539, and

Dexter v. Harvard College, 176 Mass. 192. It is not confined to mere almsgiving or the relief of poverty and distress, but has a wider signification, which embraces the improvement and promotion of the happiness of man. *Molly Varnum Chapter, D. A. R. v. Lowell*, 204 Mass. 487. Gifts to colleges and other educational institutions, for the advancement of learning or to aid necessitous students in procuring an education, are charitable even if the donee may derive revenue from other investments and from students who are able to pay. *Mount Hermon Boys' School v. Gill*, 145 Mass. 139. *Dexter v. Harvard College*, 176 Mass. 192. So in *Franklin Square House v. Boston*, 188 Mass. 409, and *Thornton v. Franklin Square House*, 200 Mass. 465, it was decided, that property, acquired, occupied and used as a home for working girls who paid for fuel, light, food, laundry and domestic services at prices as cheap or cheaper than such accommodations could be obtained elsewhere under similar conditions of respectability and comfort, was held and occupied for charitable uses and exempt from taxation. The increase of charitable funds, through receipts from patients or inmates who are able to pay wholly or partially for benefits received, does not change a home for aged people, or hospital, organized and conducted as a charity, into a private association, maintained for the pecuniary advantage of the promoters. The original eleemosynary character of the institution is not transformed by this patronage, even if sufficient to relieve it from financial burdens, but the charity as established remains unaffected. *Gooch v. Association for Relief of Aged Females*, 109 Mass. 558, 567. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 435. *Thornton v. Franklin Square House*, 200 Mass. 465. *Blake v. Mayor of London*, 18 Q. B. D. 437. *Cawse v. Nottingham Lunatic Hospital*, [1891] 1 Q. B. 585, 590, 592.

If, as the commissioner finds, payments were received from patients or patrons who were able to pay the prices charged for food and lodging provided or medical services rendered, he also reports that no part of this revenue was retained for compensation or divided as profits. It is true, that, while the petitioner, by liberally advertising its attractions as a hospital or sanitarium with its methods of cure and a schedule of prices has succeeded in securing quite an extensive patronage from paying patients,

it has not neglected to apply the income derived from all sources to promote the objects for which it was organized. A bequest to trustees of a fund to be accumulated and administered for the purposes enumerated in the charter would have been valid as a public charity, and as such relieved from taxation. *Saltonstall v. Sanders*, 11 Allen, 446. *Minns v. Billings*, 183 Mass. 126. *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303. *Jones v. Habersham*, 107 U. S. 174. *Williston Seminary v. County Commissioners*, 147 Mass. 427.

The petitioner's statutory rights are not to be ascertained by an apportionment of the classes who may have been benefited, so that if the number of paying patients preponderates, the exemption fails. The dominant purpose for the promotion of which the institution was organized and has been maintained furnishes the test, whether it is a charity or a business organization conducted for commercial gain with incidental acts of benevolence and philanthropy. To be entitled to the exemption the statute requires that the property not only shall be owned, but must be occupied for the charitable purposes of its incorporation. It was said by Chief Justice Knowlton in *Emerson v. Milton Academy*, 185 Mass. 414, 415, "An occupation and use of real estate to produce income to be expended for the purposes for which the institution was incorporated is not within the statute, while an occupation whose dominant purpose is directly to accomplish some one of the objects for which the corporation was established is within it. If incidentally there are results of the use which would not entitle the property to exemption, that is immaterial, so long as the dominant purpose of the occupation is within the statute." If the petitioner had decided to receive only those who were able to pay the charges for what they received until from accumulated profits the institution could be maintained solely for the relief of the poor, while the end to be attained would have been charitable and the same as if the fund so provided had been secured by their voluntary contributions, the real estate during the period of accumulation, although owned, would not have been occupied by it within the meaning of the statute. *Chapel of the Good Shepherd v. Boston*, 120 Mass. 212. *Salem Lyceum v. Salem*, 154 Mass. 15.

During the years, however, for which a tax has been levied the occupation of the real estate has not been thus limited or restricted. But, having been occupied and used for the administration of the charity for which the petitioner was incorporated, it is entitled to the exemption from taxation provided by the statute, while the personal property, being either a part of the furnishings and equipment of the hospital, or exclusively used in connection with its maintenance, also was exempt. *Mount Hermon Boys' School v. Gill*, 145 Mass. 139.

By the terms of the report, judgment is to be entered for the petitioner for the amount of the tax assessed upon its real and personal property, with interest from the dates therein named.

So ordered.

COMMONWEALTH vs. CHARLES A. NEWHALL.

Suffolk. January 18, 1910. — February 28, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Automobile. Statute, Construction. Way, Public. Street Commissioners.

Review by HAMMOND, J., of statutes regarding the operation of automobiles in this Commonwealth.

A statute, which relates only to the regulation of the operation of motor vehicles in this Commonwealth, contains a provision, "No ordinance, by-law or regulation now in force in any city or town or in any park or parkway which regulates the speed at which motor vehicles shall run upon its ways, or which excludes such vehicles therefrom or which governs or restricts the use of such vehicles shall hereafter have any force or effect." Previous to the enactment of the statute, an elaborate code of regulations had been adopted by the street commissioners of the city of Boston under the authority of an act of the Legislature which made no reference to motor vehicles. If the statute were held to have made of no effect the regulations of the street commissioners, the result would be to allow to those operating motor vehicles the use of the streets of Boston without observance of the code and thus to impair and probably eventually substantially to destroy the efficiency of the code. *Held*, that before the statute could be given such effect, the intent of the Legislature therefor must be shown plainly by the language of the statute interpreted in the light of the circumstances at the time it was passed and of the history of the legislation of which it formed a part.

In St. 1909, c. 534, relating to the operation of motor vehicles, that part of § 17, which provides that "No ordinance, by-law or regulation now in force in any city or town or in any park or parkway which regulates the speed at

which motor vehicles shall be run upon its ways or which excludes such vehicles therefrom or which governs or restricts the use of such vehicles shall hereafter have any force or effect," was intended by the Legislature to refer only to those regulations which theretofore had been made under St. 1908, c. 473, and St. 1906, c. 366, referring to the same subject, and was not intended to refer to or to affect a code of "street traffic regulations and rules for driving" which previously had been established by the street commissioners of the city of Boston as to all vehicles on its public streets under the authority given to them by St. 1908, c. 447, to "pass ordinances, by-laws or regulations relative to street traffic, or to the movement, stopping or standing of vehicles," and "to pass, and to amend or change from time to time, all regulations for such purpose, not inconsistent with law, which they shall deem needful to prevent the congestion and delay of traffic, and for other purposes"; and therefore those of such rules which are not inconsistent with the statute remain in force as to motor vehicles as well as to other vehicles therein described.

HAMMOND, J. The defendant has been found guilty of leaving an automobile "standing for more than twenty minutes in a certain public street" called Court Square, in the city of Boston, in violation of a rule and regulation of the board of street commissioners of that city. We do not understand the defendant to contend that the rule was not valid when made by the street commissioners. His contention is that it was rendered void and of no effect by virtue of St. 1909, c. 584, § 17. The only question is whether that contention is sound. If it is, then the exceptions should be sustained; otherwise they should be overruled.

Soon after the general appearance of automobiles upon the public ways of the Commonwealth it became apparent that by reason of their great speed danger was likely to arise from their unskilful or reckless operation, and the Legislature began to act. It first limited the rate of speed, especially when approaching crossings of ways, and prescribed certain precautions to be exercised by persons operating an automobile when approaching other vehicles. St. 1902, c. 315. But this statute, so narrow in scope, does not seem to have been satisfactory, and the next year it was repealed and a new statute enacted. This second act (St. 1903, c. 473) was entitled "An Act to provide for registering automobiles and motor cycles, and for licensing operators thereof." It provided for the registration of all such vehicles, and for licensing operators thereof, and, with some changes not material here, re-enacted the provisions of the first statute as to speed and precautions. It further provided

that every such vehicle should have a brake, bell or other means of signalling, and a light. Section 14 contained the following language: "Boards of aldermen of cities and the selectmen of towns may make special regulations as to the speed of automobiles and motor cycles, and as to the use of such vehicles upon particular roads or ways, including the right to exclude them altogether therefrom. Such exclusion, however, shall be subject to an appeal to the Massachusetts highway commission, whose decision in the case shall be final." This is the first statute expressly giving to aldermen and selectmen power to make regulations as to automobiles as such. Subsequently statutes were passed making various changes in the law. St. 1905, c. 311, and c. 366. The statute last cited re-enacted, with some modifications as to speed only, the provision giving to local authorities power to make special regulations as to the speed of automobiles and motor cycles, and as to the use of such vehicles on particular roads and ways, including their complete exclusion therefrom, and contained the following clause: "No ordinance, by-law or regulation now in force in any city or town which regulates the speed at which automobiles or motor vehicles shall be run upon its public ways shall hereafter have any force or effect." The purpose of this statute appears to have been to wipe out all regulations as to speed then in force which had been made by the local authorities under St. 1903, c. 473, as amended, and to allow such authorities to begin anew upon that subject under different conditions. Various changes were made from time to time by the Legislature. See St. 1906, cc. 353, 412; St. 1907, cc. 203, 408, 494, 580; St. 1908, cc. 642, 648. But the power given to the local boards to make regulations as to automobiles by St. 1903, c. 473, § 14, and St. 1905, c. 366, still remained in 1908, although the conditions under which the power was to become effective were somewhat changed. At first this power seems to have been quite unrestricted, so far as respects approval by any other board or officer, as to the speed of the automobile, although restricted as to its exclusion. St. 1903, c. 473, § 14. Afterwards the power both as to speed and exclusion was subject under certain conditions to the approval of the Massachusetts highway commission. St. 1905, c. 366, and St. 1906, c. 412.

In 1908, the Legislature, thinking that the laws as to automobiles and motor cycles should be codified, directed the highway commission, with the assistance of the Attorney General, to perform the work and report to the then next Legislature. Res. 1908, c. 127. The resolve called for a complete consolidation and arrangement of the laws of the Commonwealth relating to those vehicles, so that the same might be "concise, plain and intelligible."

This commission made their report to the Legislature of 1909, and thereafter St. 1909, c. 534, was passed. At the time this statute was passed there was in force a code of "street traffic regulations and rules for driving" which had been established by the street commissioners of the city of Boston under the authority given to them by St. 1908, c. 447, to "pass ordinances, by-laws or regulations relative to street traffic, or to the movement, stopping or standing of vehicles," and to prescribe certain penalties for the violation thereof, with the further authority "to pass, and to amend or change from time to time, all regulations for such purpose, not inconsistent with law, which they shall deem needful to prevent the congestion and delay of traffic, and for other purposes." The code is voluminous. It prescribes elaborate rules as to the moving of vehicles, as to signals to be given by the drivers thereof to give notice of their intended movements, as to the right of way for vehicles belonging to the police or fire department, or for mail wagons or ambulances, as to the speed of vehicles especially when approaching a crossing of intersecting streets, as to the stopping, standing or turning of vehicles, with a special rule as to certain streets therein particularly specified, as to receiving and delivering passengers or merchandise, as to care in driving and as to the rights and duties of pedestrians. It further names several very crowded streets in which during certain busy hours vehicles shall pass only one way, and also streets in which during certain hours there shall be no delivery of the class of articles therein especially named, and no "backing up of vehicles to the curb or the collection of garbage." It contains over fifty sections, some of which are very comprehensive, distributed under twelve heads called articles. In a word it forms a complicated and extensive system of rules for the regulation of vehicles in order that the streets

may be free from undue congestion, and be more convenient for the public travel. This code has been established by the public officers to whom the power and duty was delegated by the Legislature; and in the absence of any evidence to the contrary it must be assumed to be reasonably necessary for the purpose for which it was intended, namely, to relieve congestion of the streets and promote the convenience of the public travel. It nowhere contains any rule specially applicable to automobiles or motor cycles, but all vehicles are included under the general name of vehicle. Such is a brief description of the code of rules in force in Boston at the time of the passage of St. 1909, c. 534.

The defendant contends that so far as respects automobiles and motor cycles the whole code was invalidated by this statute; that it was the intention of the Legislature to relieve automobiles and motor cycles from the scope of these rules; that accordingly an automobile, which is one of the most bulky vehicles upon the streets, may go either way on a "one way" street; may turn on any street the driver chooses notwithstanding the prohibition as to other vehicles, although it may require much more room than most vehicles in which to turn; and that it may stand in the street as long as it pleases, subject only to the general law of creating a nuisance in the street. In a word, the contention is that the automobilist, so far as this code is concerned, may run rampant upon the crowded streets of the large city of Boston. It is easy to see that if this contention is true, the efficiency of the code so far as it attempts to relieve the congestion of the crowded streets will be greatly impaired if not substantially destroyed. Such a conclusion as to the intent of the Legislature is not to be reached unless plainly shown by the language of the statute interpreted in the light of the circumstances at the time it was passed, and of the history of the legislation of which it forms a part.

The section of St. 1909, c. 534, in which the repeal of the code so far as it affects automobiles is supposed to be found, is the seventeenth. After providing that the local authorities may make special regulations as to the speed of motor vehicles, and as to the use of such vehicles upon public ways, and may exclude such vehicles altogether from certain ways, every such

regulation not to be valid until advertised as therein required, nor until approved by the highway commission, the section proceeds thus: "No ordinance, by-law or regulation now in force in any city or town or in any park or parkway which regulates the speed at which motor vehicles shall be run upon its ways or which excludes such vehicles therefrom or which governs or restricts the use of such vehicles shall hereafter have any force or effect," with an exception in favor of the regulations in force on the island of Nantucket and those made by the Metropolitan Park Commission. This is not the first time a provision like this in principle has appeared. There was one in St. 1905, c. 366: and as, when by that statute the Legislature changed the conditions under which the regulations of the local authorities should become valid, and provided that no ordinance, by-law or regulation then in force as to speed should have any effect, it referred only to those regulations which had been made under St. 1903, c. 473, (the only statute which up to that time had been passed expressly authorizing the local authorities to act in the matter,) so, when in § 17 of the St. of 1909 it again changed the conditions under which these regulations of the local authorities should become valid and used the language above quoted upon which the defendant relies, it in like manner referred only to those regulations which theretofore had been made under St. 1903, c. 473, and St. 1905, c. 366, and the amendments thereof. The Legislature was dealing in this section with the subject of regulations made and to be made by the local authorities under the special legislation as to motor vehicles, and the purpose of the section was to wipe out what had been done by the local authorities under such special legislation and to begin again under somewhat different conditions. It refers in no way to any rule and regulation not so made or to be made, and has no bearing on the question whether the street regulations made by the street commissioners under St. 1908, c. 447, are now in force. So far as respects the rules of the Metropolitan Park Commission, it simply continues the exemption which appears in all the previous legislation. Sts. 1903, c. 473, § 14; 1905, c. 366, § 1; 1906, c. 353, § 4; c. 412, § 9.

It does not necessarily follow, however, that the street commissioners can control motor vehicles as if St. 1909, c. 534, had

not been passed. The power of the Legislature is superior to the power of the street commissioners. The apparent purpose of the St. of 1909 is to simplify and unify, in certain respects, the regulations with reference to the operation of motor vehicles and the licensing of drivers. Wherever the statute has prescribed rules as to such matters it must prevail; and any rule of the street commissioners which is inconsistent with the statute must be held to be invalid. But the ground upon which such rule must be held to be invalid is, not that it was repealed by the repealing clause above named, but that it is inconsistent with some rule expressly or by fair implication laid down by the statute.

Upon looking into the statute there does not appear to be any provision regulating the time during which an automobile may be left standing in the street. The regulation of the street commissioners is not therefore inconsistent with the statute, and it must be held to be valid.

Exceptions overruled.

The case was submitted on briefs.

W. A. Thibodeau & G. L. Ellsworth, for the defendant.

T. D. Lavelle, Assistant District Attorney, for the Commonwealth.



ELIZA J. SOLIS & others vs. WILLIAM WILLIAMS & another.

Suffolk. November 18, 19, 1909. — March 1, 1910.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Evidence, Relevancy and materiality. Fraud. Descent and Distribution. Devise and Legacy. Will. Conflict of Laws. Equity Jurisdiction, Statute of limitations. Tax, Cancellation of tax deed. Constitutional Law, Obligation of contracts. Statute, Amendment. Limitations, Statute of.

Where, in a bill in equity, fraud on the part of the defendant is averred and is made one of the grounds for relief sought in the impeaching and setting aside of a certain transaction, evidence tending to show the relation of the parties to the alleged fraud and their conduct and their motives is admissible to explain the nature of the transaction which it is sought to impeach and set aside.

It seems, that land in this Commonwealth, undertaken to be devised by the will of one, who died domiciled in another State and whose will has been proved only in that State, may be treated as intestate property in a suit to redeem it from a tax sale.

- A statute which attempted to extend the time within which land could be redeemed from tax sales already made under R. L. c. 13, §§ 58, 75, would be unconstitutional as impairing the obligation of contracts.
- B. L. c. 13, § 75, giving to the Supreme Judicial Court and to the Superior Court jurisdiction in equity in all cases of taking or sale of land for the payment of taxes "if relief is sought within five years after the taking or sale," was amended by St. 1905, c. 825, § 3, which was approved on April 21, 1905, so that the period of limitation was made six years instead of five years. A suit in equity was begun on December 11, 1907, to cancel and discharge a tax deed given after a sale which occurred on January 10, 1902. *Held*, that the suit must be dismissed, because the amendment to the statute is applicable only to tax sales made after its passage.

BILL IN EQUITY, filed in the Superior Court on December 11, 1907, against William Williams and Robert J. Jones, seeking to have cancelled and discharged certain tax deeds under which the defendant Jones claimed title to real estate numbered 56 on Liverpool Street in that part of Boston called East Boston, and for an accounting of rents and profits received by the defendants.

The case was referred to Charles E. Shattuck, Esquire, as master. Numerous exceptions to the report of the master were filed, most of which, because of the reasons expressed in the last paragraph of the opinion, have become immaterial. The case was heard by *Dana, J.*, and the exceptions to the report were overruled and a final decree entered dismissing the bill with costs. The plaintiffs appealed.

J. C. Ivy, (C. S. Ensign, Jr., with him,) for the plaintiffs.

R. D. Swain, (A. L. Nickerson with him,) for the defendants.

BRALEY, J. The demurrer having been rightly overruled as the bill on its face stated a case for equitable relief, the question for decision is whether upon the master's report, to which the plaintiffs have taken numerous exceptions, the decree dismissing the bill should be reversed.

By his will, Sewell F. Barker devised to his son, Charles H. Barker, a life estate with remainder to his other children, Mary E. Cary, Eliza J. Solis and Sewell F. Barker. The tenant for life having died, the plaintiffs Solis and Barker, in whom the remainder vested at the testator's death, and the plaintiff Cary who claims title under a devise from his wife, Mary E. Cary, of her share, ask specifically that certain tax deeds, under which the defendant Jones claims the fee, be cancelled, with an accounting for rents and profits received while in possession.

Inasmuch as the only interest the defendant Williams acquired was by purchase of the life estate, the money he received after it terminated belonged to the defendant Jones, by whose permission he collected the rents, and the bill as to him was properly dismissed.

The cancellation or discharge of invalid conveyances of record, which if allowed to stand cast doubt or uncertainty upon a title otherwise good, is a well recognized subject of equity jurisdiction. *Rogers v. Nichols*, 186 Mass. 440. *Sawyer v. Cook*, 188 Mass. 163, 170. The bill charges in the third and fourth paragraphs, that one Bailey, from whom Jones (who hereinafter will be called the defendant) purchased with knowledge of the fraudulent purpose, united with the life tenant and his wife in a scheme to permit the property to be sold for non-payment of taxes, in order that Bailey should buy at the sale for the purpose of depriving the plaintiffs of their remainder in the land. But upon evidence not reported, the master finds these allegations have not been proved, and, having become unimportant, they may be dismissed. The exceptions to his findings as to the necessitous condition of the life tenant and his family, which influenced Bailey to lend money to them from time to time for their support, and that to secure repayment of the loans he bid off the property at the first sale, are without merit and must be overruled. Where fraud is charged, the relation of the parties, their conduct and motives are admissible to explain the nature of the transaction which it is sought to impeach and set aside. In reference to the purchase by Bailey at the sale for the taxes of 1900, the master reports that it was orally "arranged between Mr. and Mrs. Barker that he should purchase the property at the sale as security for his loans . . . which then amounted to \$1,300. It was further agreed that when Mr. Bailey should have received from the rents of the property a sufficient amount to pay the indebtedness . . . he should reconvey to Mrs. Barker." No conveyance by the life tenant or those claiming under him was ever made to Bailey, and it was not until after receiving the collector's deed that he entered into possession. The master having decided that before the time for redemption expired, either under this sale or subsequent sales for non-payment of taxes during his occupation, and where the grantees in the col-

lector's deeds conveyed to him, the rents were more than sufficient to have repaid all the assessments and charges, the plaintiffs contend, that the rents should have been applied in redemption, and, as equity will treat that as done which ought to have been done, that the tax titles never became absolute but were discharged by payment. The master, however, found that the defendant bought for a valuable consideration, without notice of the arrangement. Undoubtedly it is the duty of the life tenant and of those who may succeed to his estate by purchase to pay the taxes assessed upon the property, nor can they by payment acquire any adverse rights against the remaindermen. *Wider-sum v. Bender*, 172 Mass. 436, 438. *Varney v. Stevens*, 22 Maine, 331, 334. *Garland v. Garland*, 73 Maine, 97. *Murch v. Smith Manuf. Co.* 2 Dick. 193. *Ferguson v. Quinn*, 97 Tenn. 46. *Defreese v. Lake*, 109 Mich. 415, 429. *Reyburn v. Wallace*, 93 Mo. 326, 329. *Stevens v. Melcher*, 152 N. Y. 551. *Pike v. Wassell*, 94 U. S. 711. But Bailey's title was not derived from the tenant. The taxes for the year 1900 and 1901 had been lawfully assessed, even if the tenant held an estate for the life of her husband, and the report states that the sales by the collector were valid. *Bates v. Sharon*, 175 Mass. 293. The conveyance to Bailey of the tax title held by the grantees who purchased at the sale for a failure to pay the taxes assessed for the year 1901 also conveyed an independent title. The lien for that year's assessment was paramount to the previous liens under which he held the land. *Keen v. Sheehan*, 154 Mass. 208. *Abbott v. Frost*, 185 Mass. 398, 401. The tax lien attached to the entire estate, and the collector's deeds conveyed a fee by an independent title which under Bailey's conveyance to him vested in the defendant. *Abbott v. Frost*, 185 Mass. 398, 401. *Weeks v. Grace*, 194 Mass. 296, 300. *Watkins v. Green*, 101 Mich. 493. The assessment to Bailey of the taxes for 1904 under which the property was again sold by the collector to one Nickerson, who then conveyed to the defendant, was properly levied. Where an estate has been sold for taxes and the deed to the purchaser recorded, the assessors may lawfully tax the property to the grantee. *Roberts v. Welsh*, 192 Mass. 278. *Rogers v. Lynn*, 200 Mass. 354. *Charland v. Home for Aged Women*, 204 Mass. 568.

It follows from the master's conclusions upon unreported

evidence that the defendant is an innocent purchaser for value. The plaintiffs not having shown that actual possession and the legal title are united in them, the bill cannot be maintained for a cancellation of the various tax deeds which they allege were invalid. *First Baptist Church of Sharon v. Harper*, 191 Mass. 196, 209. But as the purchaser at a tax sale and those who claim under him hold the title subject to the right of redemption, the plaintiffs under the prayer for general relief ask for leave to redeem. *Wiggins v. Brand*, 202 Mass. 141, 147. *Bullock v. Adams*, 5 C. E. Green, 367. Both branches of the case were decided by the master, who without further stating his reasons reports that it would be inequitable under the circumstances to permit redemption.

It appears from the report that the plaintiffs were non-residents, and there is no finding as to when they first knew of the sale or sales by the collector. The duty of paying the assessments did not devolve upon them, and while the remaindermen knew of the poverty of their brother, they are not shown to have been actually informed that the taxes were in arrears, or in possession of any information which should have put them upon inquiry. If there was no actual intent to defraud, neglect to pay the taxes by the life tenant or those who by purchase succeeded to his interest, and their entering into an agreement whereby Bailey should acquire the property at a tax sale in payment of sums advanced to the life tenant, or to hold it as security until the loans were repaid and then to convey the premises to the life tenant or his wife, effectually destroyed the remainder and in law was a fraud upon the plaintiffs. *Varney v. Stevens*, 22 Maine, 331, 334. *Burgess v. Robinson*, 95 Maine, 120, 127. *Cannon v. Barry*, 59 Miss. 289. By Pub. Sts. c. 124, § 16, re-enacted in R. L. c. 185, § 1, an action of waste, if seasonably brought, could have been maintained against the life tenant, his wife and Bailey, to recover the estate with "the amount of the damage." *Sackett v. Sackett*, 8 Pick. 309. *Stetson v. Day*, 51 Maine, 434, 436. *Padelford v. Padelford*, 7 Pick. 152. The defendant has pleaded laches, but the report contains no finding that the plaintiffs have been negligent. Indeed the inference to be drawn from what the master says is that until the death of the life tenant in May, 1907, the title

was not examined. In consequence of the investigation which then followed the bill was filed. In stating the account it appears that the receipts from rents exceeded all disbursements and advancements made by Bailey, and that since coming into possession the defendant has been reimbursed for all expenditures on the property. If no tender preceded the bringing of the suit, the offer in the bill to pay any sum which might be found due upon an accounting was sufficient. *Green v. Tanner*, 8 Met. 411. *Simonds v. Towne*, 4 Gray, 603. *Way v. Mullett*, 143 Mass. 49. *Dennett v. Codman*, 158 Mass. 371, 374.

The will under which the plaintiff Cary claims as devisee never having been admitted to ancillary probate, the defendant contends that he failed to establish his right to redeem. A will without probate does not pass title to lands, and its admission to probate in the foreign domicile of the testatrix, and nothing more, was not effectual to vest the plaintiff with her interest. *Dublin v. Chadbourn*, 16 Mass. 433. *Campbell v. Sheldon*, 13 Pick. 8. *Campbell v. Wallace*, 10 Gray, 162. *Chase v. Chase*, 2 Allen, 101, 104. But if, as to the real property in this Commonwealth, the will is a nullity by the law of the forum without ancillary probate, his rights may be determined as if she died intestate. By R. L. c. 140, § 3, whether children were born of the marriage, or they were childless, he takes an estate in fee either of his wife's share or one third of it, and may redeem. The defendant, however, would not be aided even if the bill as to Cary were dismissed. It is settled that a tenant in common can redeem, although upon redemption the tax lien is kept alive for his benefit until his co-tenants pay their share of the redemption money. *Hurley v. Hurley*, 148 Mass. 444.

If ordinarily under these circumstances equitable relief should be decreed, the defendant's answer avers that, suit not having been brought within the time allowed for redemption, the bill must be dismissed. *Widersum v. Bender*, 172 Mass. 436. *O'Callaghan v. Lancy*, 187 Mass. 474. The first sale occurred January 10, 1902, and the bill was filed December 11, 1907, and not only had the period of two years expired under R. L. c. 13, § 58, but under § 75 permitting relief in equity if sought within five years from the date of sale the bill was filed too late. But if by St. 1905, c. 325, § 3, section 75 was amended and the period

extended to six years, the plaintiffs still are barred. A valid sale by the collector is a contract, subject to the provisions of law then in force relating to sales for unpaid taxes. The grantee is seised at the time of conveyance and acquires a vested interest, which can be divested only by redemption. It was not therefore within the power of the Legislature by the subsequent statute, to import new terms into the sale, without impairing the obligation of contracts. *Perry v. Lancy*, 179 Mass. 183. *Barnitz v. Beverly*, 163 U. S. 118. *Dikeman v. Dikeman*, 11 Paige, 484. *Merrill v. Dearing*, 32 Minn. 479, 481. *Sigman v. Lundy*, 66 Miss. 522. *Robinson v. Howe*, 13 Wis. 841. *Rollins v. Wright*, 93 Cal. 395. The amendatory act being applicable only to sales made after its passage, the decrees of the Superior Court overruling the exceptions and dismissing the bill must be affirmed.

So ordered.

FRED L. HEWITT, trustee, vs. FRANCIS L. HAYES & others, executors.

Suffolk. December 7, 1909. — March 1, 1910.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Equity Jurisdiction, To follow trust fund. Bankruptcy. Election.

When a trustee deposits in a bank in one fund, without any earmark, money of his own and money which he holds in trust for another, the beneficiary of the trust, although he is wholly unable to identify his money in the bank, may at his election follow the mixed fund which thus has been created by the trustee and enforce a claim or charge upon it for his indemnity.

In a suit in equity by a beneficiary to follow money of the plaintiff which a trustee has mingled with money of his own in a deposit in a bank, it will be presumed in favor of the plaintiff that, so long as any of the trustee's own money remained in the fund available for use, withdrawals made by the trustee by check from the mixed fund were made from the trustee's own part of the fund and not from the money of the trust.

Where one who is a trustee for a number of separate beneficiaries mingles their money with money of his own and deposits the whole in one fund in a bank, and then is adjudged a bankrupt, a beneficiary whose money is contained in the fund can maintain a suit in equity to charge this particular mixed fund with his claim for indemnity, or he may prove his claim in bankruptcy against the whole estate of the bankrupt trustee in the hands of his trustee in bankruptcy, but he

cannot do both, because the remedies are inconsistent; and, if with a full knowledge of all the circumstances he proves his claim in bankruptcy, this is an election of remedy which is a bar to a suit in equity by him to have his claim declared to be a charge upon the specific fund deposited in the bank. Under what circumstances such an election is final, and in what cases a beneficiary, after proving his claim in bankruptcy, may be allowed to expunge such proof and reassert his equitable rights, here was not considered.

In a suit in equity by the trustee in bankruptcy of one of the two partners of an insolvent firm against the executor of the will of the other partner, who died insolvent, to compel the defendant to turn over to the plaintiff a specific fund in the possession of the defendant as executor, where all persons seeking to subject the fund to liens or charges were admitted to the suit as intervening claimants, it appeared that the fund in question was deposited in a bank and was a continuation of a general bank account of the insolvent firm which afterwards stood in the single name of the defendant's testator, and that in it were mingled in one common fund the money of the firm and of the various claimants to whom the firm and the defendant's testator stood in a fiduciary relation. It further appeared that on a certain date the account had been overdrawn by more than \$2,000. In determining the respective rights of those of the claimants who were entitled to pursue this fund, it was *held*, that none of the claimants could have a charge upon the fund for any deposit made before the date when the account was overdrawn, and that the amount for which any of them was entitled to charge the fund after that time must be determined by taking the deposit first thereafter made of his money and adding to it the amount of any later deposits of his money; but that the amount must be diminished by the amount of any withdrawals by the defendant's testator from the portion of the fund which was subject to the charge in favor of such claimant; that withdrawals made by the defendant's testator for his own use or that of his firm must be treated as made from that part of the fund which belonged to him or them so far as that was practicable; but that, when this could not be done, the withdrawals, as among those claimants who were entitled to charge the fund, must be charged against the deposits in the order of their respective dates, the rule that the first withdrawals should be applied to the first deposits being followed among the claimants, although not followed between them and the defendant's testator, who was their trustee; that, when the amount subject to a charge in favor of a claimant had been diminished to any extent by withdrawals, it was not to be increased by any subsequent deposit made by the defendant's testator of money which was not shown to have been the money of that particular claimant; and that no claimant was to be allowed a charge upon any part of the fund which, under the rules stated above, was subject to a charge in favor of a claimant prior to him in time; that, if the total amount that could be held by all the claimants who were entitled to charges upon the fund, when determined as above, exceeded the amount of the fund, the fund was to be distributed among them in proportion to the amounts of their respective charges; and that, if the total amount of the charges was less than the amount of the fund, the claimants entitled to the charges were to receive the amounts of their respective charges in full, and the residue of the fund was to be paid to the plaintiff as trustee in bankruptcy.

BILL IN EQUITY, filed in the Supreme Judicial Court on September 28, 1908, and amended on October 1, 1908, and

October 5, 1909, by the trustee in bankruptcy of the estate of Edward A. Bangs against the executors of the will of S. Gannett Wells, late of Boston, and by the later amendment against the defendants Hayes and Wing individually, to compel the defendants to pay and turn over to the plaintiff certain deposits in Boston banks amounting to about \$27,000 standing in the names of the defendants as executors and a deposit of about \$11,000 in the National Shawmut Bank standing in the names of the defendants individually, or such portion of such funds as might be found to be partnership property of the firm of Bangs and Wells, to be administered by the plaintiff as a part of the estate of the bankrupt as the surviving member of that firm.

An interlocutory decree was made ordering that the persons named therein for whom the firm of Bangs and Wells were acting as trustees, agents or attorneys or in any other fiduciary capacity at the time of the death of Wells should be made parties defendant.

The case was referred to Ethelbert V. Grabill, Esquire, as master, "to hear the parties and their evidence, to find the facts and report the same to the court." The master filed a report, and later filed a supplemental report upon certain matters in regard to which the report had been recommitted to him. The essential facts reported by the master are stated in the opinion.

The case came on to be heard, upon the pleadings, the master's report and supplemental report and the exceptions thereto, before *Braley, J.*, who reserved it for determination by the full court.

F. L. Hewitt, trustee in bankruptcy of the estate of Edward A. Bangs, *pro se*.

H. Williams, Jr., (*C. A. Williams* with him,) for Francis L. Hayes and others, executors of the will of S. Gannett Wells, and for Francis L. Hayes and another, individually.

L. C. Southard & G. L. Ellsworth, for William E. Boardman and others.

R. Homans, (*F. J. Sulloway* with him,) for Francis R. Bangs and others.

R. H. Gardiner, Jr., for David H. Hodgkinson and others, intervening claimants.

SHELDON, J. It has been decided that the plaintiff is entitled to require the original defendants, the executors of the will of

Samuel G. Wells, who was a partner in the late firm of Bangs and Wells, to turn over to the plaintiff all the property and assets of that firm which have come into the hands of the defendants. *Hewitt v. Hayes*, 204 Mass. 586. This bill is brought to compel them to turn over and deliver to the plaintiff certain specific funds in the possession of the defendants. The main question raised as to each of these funds is whether they should be regarded as assets of the late firm that ought to be applied in payment of its debts or whether they are made up of trust moneys, which the intervening claimants or any of them have a right to hold, or at least to subject to an equitable lien or charge in behalf of the claimants.

One of these funds, which has been called in argument the "for whom it may concern" fund was created and is held by the defendants Hayes and Wing individually. They were acting under the power of attorney given to them by Bangs after the death of Wells. This fund was made up of the cash found in the cash drawer of the firm which belonged to the firm itself and of other sums which also belonged to the firm, either as the proceeds of its property or as commissions due to it or otherwise. This fund is now deposited in the Shawmut National Bank in the names of the defendants Hayes and Wing "for the benefit of whom it may concern." It now amounts to more than \$10,000. In our opinion this fund, which has been derived entirely from the property of the late firm, should be paid by Hayes and Wing to the plaintiff as prayed for in the bill; and the decree will so order.

The "S. G. W. fund," it has been found, belongs as between the late firm and the individual estate of Wells entirely to the former. This finding was excepted to by the executors of Wells; but it seems to us that it is not inconsistent with any of the subsidiary findings upon which it was based, and the evidence is not reported. It follows that this exception to the master's supplementary report must be overruled.

Certain of the intervening claimants have excepted to the master's finding that the S. G. W. fund was one entire bank account, in no way separated or divided into parts so that any separate or distinct parts thereof were or could be established as trust property belonging to any of the claimants, and also to the

ruling of the master made upon the tabulations submitted by these claimants and their contention that thereby certain distinct shares or proportions of this fund could be established or identified as trust property belonging to them. And some of the intervening claimants contend that in equity they are at least entitled severally to a charge or lien upon this fund for their satisfaction. Others of the claimants agree with the contention made by the plaintiff. These contentions raise the questions which are now to be passed upon.

It is not disputed and we do not doubt that the relations between the late firm of Bangs and Wells and each of its members on the one side and the respective parties for whom they acted, including these claimants, on the other side, were strictly fiduciary. Either the firm or one of its members had been appointed and was acting as trustee for some of them, either by virtue of an appointment by the Probate Court or under some agreement between the parties. In other cases the firm was acting as the representative or agent of other trustees or in the management of property which had been committed to its care by the owners thereof. Their relations were strictly confidential and fiduciary, and they were under the ordinary obligations of trustees. *Campbell v. Cook*, 193 Mass. 251. *Matter of Le Blanc*, 14 Hun, 8. *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411. *Gibert v. Gonard*, 54 L. J. (N. S.) Ch. 439.

This fund, which had been deposited in the name of Wells in the City Trust Company, was really a continuation of the general bank account of the firm. Both money belonging to the firm itself and money collected by it or by Wells for it, but belonging to different principals or *cestuis que trust* for whom it had been collected, were deposited in this account. The latter amounts however made up the larger part of the deposits. Wells also drew checks against this fund or account, partly for the private uses of the firm or its partners, but mainly for proper payments to or for some or others of the parties to whom it equitably, in part at least, belonged. But all the amounts, including what belonged to the firm or to either of the partners therein and the different amounts that should have been paid to the respective principals or beneficiaries for whom it was held,

were mingled in the bank in one common fund, so that, after the various deposits and the various withdrawals that were made, it would be difficult, if not impossible, upon any practicable method of identification or computation, to ascertain or distinguish any separate parts thereof as trust property belonging in equity to any of the intervening claimants. This is especially true when we consider that the amount of this fund is only about one-half of the total amount due to the claimants; and no apportionment of the fund could be made among them on the basis of an identification of their property without such inequality as might practically be a denial of justice to some of them. We are of opinion that the exceptions taken by some of the intervening claimants to the master's supplementary report should be overruled.

But these considerations do not dispose of all the questions raised in the case. We regard it as settled, to go no further than the facts in the case at bar, that when a trustee deposits in a bank in one fund without any earmark money of his own and money which he holds in trust for another, the beneficiary, though wholly unable to identify his money in the bank, may yet at his election follow the mixed fund which has been thus created by the trustee, and enforce a claim or charge thereon for his indemnity. And for the protection of the beneficiary it will be presumed that withdrawals made by the trustee by check from this mixed fund were made from the trustee's own part of the fund and not from that part which consisted of the trust money, so long as there remains in the fund available for use any part of the trustee's own money. *National Bank v. Insurance Co.* 104 U. S. 54, citing and stating the cases of *Pennell v. Deffell*, 4 DeG., M. & G. 372; *Frith v. Cartland*, 2 Hem. & M. 417; *In re West of England & South Wales District Bank*, 11 Ch. D. 772; *In re Hallett's estate*, 13 Ch. D. 696; *Taylor v. Plumer*, 3 M. & S. 562; *Farmers' & Mechanics' National Bank, v. King*, 57 Penn. St. 202; *Van Alen v. American National Bank*, 52 N. Y. 1. The rule in *Clayton's case*, 1 Mer. 572, that checks are to be applied against deposits in the order of their respective dates, has been modified to this extent, as is shown by the cases above cited. And see further as to the general principle stated, *Houghton v. Davenport*, 74 Maine, 590; *Cush-*

man v. Goodwin, 95 Maine, 353; *Importers & Traders' National Bank v. Peters*, 123 N. Y. 272; *Ellicott v. Kuhl*, 15 Dick. 333; *Fire & Water Commissioners v. Wilkinson*, 119 Mich. 655; *Peak v. Ellicott*, 30 Kans. 156; *Elizalde v. Elizalde*, 137 Cal. 634; *Richardson v. New Orleans Debenture Redemption Co.* 102 Fed. Rep. 780; *Hancock v. Smith*, 41 Ch. D. 456; *Ex parte Cooke*, 4 Ch. D. 123. The converse of this doctrine was maintained in *In re Oatway*, [1903] 2 Ch. 356.

The beneficiary is not allowed a charge upon the entire fund, regardless of deposits and withdrawals made after the deposit of his own money, but only upon what is left in the fund after the application in the mode we have stated of whatever withdrawals have been made by the trustee. *Peters v. Bain*, 133 U. S. 670. *In re Mulligan*, 116 Fed. Rep. 715; and 9 Am. Bank. Rep. 8, 11. *Boone County National Bank v. Latimer*, 67 Fed. Rep. 27. *Ober & Sons Co. v. Cochran*, 118 Ga. 396. *Woodhouse v. Crandall*, 197 Ill. 104. *Burnham v. Barth*, 89 Wis. 362. He is not given a charge upon the general estate of the trustee, on the ground that that estate has been enriched at his expense, but is merely allowed to hold a charge upon the specific account or fund into which his money has gone, and in which equity can presume that it still remains. See the discussion of this question in the note to *Board of County Commissioners v. Strawn*, 15 L. R. A. (N. S.) 1100.

But it is said that our own recent decisions are at variance with this doctrine. We do not so consider. *Little v. Chadwick*, 151 Mass. 109, turned on the fact that the trust fund there in question could neither be identified nor traced into any specific fund; and the court said that it was not enough that it had gone into the general estate of the defaulting trustee. But it was expressly stated in the opinion, as indeed is manifest, that there was nothing in that decision contrary to *National Bank v. Insurance Co.* 104 U. S. 54; or *In re Hallett's estate*, 13 Ch. D. 696. The same thing is true of *Lowe v. Jones*, 192 Mass. 94. It was really sought in that case to establish a trust in the general assets of an insolvent estate upon the ground that the proceeds of trust property wrongfully disposed of had gone into those general assets, and thus increased the amount of the estate. There is some authority for that contention (see the cases col-

lected by Professor Ames in 19 Harv. Law Rev. 519 *et seq.* note), but this court has never adopted it, and we are not now disposed to do so. In *O'Brien v. New England Trust Co.* 188 Mass. 186, no one but the executrix of the deceased sheriff made any claim to the deposit. And see further *Le Breton v. Peirce*, 2 Allen, 8; *Andrews v. Bank of Cape Ann*, 3 Allen, 313; *White v. Chapin*, 134 Mass. 230; *Howard v. Fay*, 188 Mass. 104; *Attorney General v. Brigham*, 142 Mass. 248.

It would be easy to apply the principle which we have stated and to enforce an equitable charge upon this fund for the protection of a *cestui que trust* whose money has gone into it and has remained a part of it, if we had to do with only one claim of this kind. But here there are several such claimants. And they fall naturally into two classes, by reason of the fact that some of them have proved their claims in the bankruptcy proceedings against Bangs. It must be determined whether that act deprives them of the right to the equitable remedy which they now seek.

Beneficiaries who do not receive from their trustee or agent what he ought to pay them may either bring an action, with or without an attachment of property, taking the position of an ordinary creditor, or they may seek to enforce their rights by such equitable remedies as are available to them. And while the defaulter remains solvent, so that he can be compelled to meet all his obligations, legal or equitable, there may be no difficulty in allowing them to proceed simultaneously in both ways. But upon the bankruptcy of their debtor or defaulter, the case becomes different. If they appropriate to themselves a fund which they can reach upon the equitable doctrine that we have stated, they thereby assume a different position from that of ordinary creditors of a common debtor; they assert rights superior to those of ordinary creditors; and by the enforcement of those rights they diminish the fund to which those creditors must look for a dividend. If on the other hand they choose to prove their claims as creditors, they can then look, not merely to the specific fund into which they might have traced some part of their money, but to all the assets, and share in those assets *pari.passu* with the other creditors. Obviously in some cases the one course, and in some cases the other, will be for their advantage. And these

are wholly inconsistent remedies. In one case, they rank themselves as creditors; in the other, they claim to be entitled to a charge upon some specific fund or property. Under these circumstances, it is the right of the general creditors and of the trustee in bankruptcy as their representative to require those who have the choice of these inconsistent remedies to elect between them. And their final adoption of one course, their completed election to avail themselves of one remedy, if made without mistake and with full knowledge of all the circumstances, is a bar to their pursuit of the other remedy. *Washburn v. Great Western Ins. Co.* 114 Mass. 175. *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 208. *Frisch v. Wells*, 200 Mass. 429. *Russell v. Owen*, 61 Mo. 185. *Conrow v. Little*, 115 N. Y. 387. *Stewart v. Isidor*, 5 Abbott Pr. (N. S.) 68. *Brown v. Farmers Bank of Kentucky*, 6 Bush, 198. *In re Granger*, 8 Nat. Bankr. Reg. 30, 37. There is no suggestion that any of those proofs was made under a mistake, as in *Morse v. Lowell*, 7 Met. 152; *Importers & Traders' National Bank v. Peters*, 123 N. Y. 272; and *Richardson v. Olivier*, 105 Fed. Rep. 277. No steps have been taken to amend or withdraw any proof, as in *Watson v. Phoenix Bank*, 8 Met. 217, 222, 223; *Bemis v. Smith*, 10 Met. 194; *Nichols v. Smith*, 143 Mass. 455; and *In re Wilder*, 101 Fed. Rep. 104. There was no erroneous choice of a remedy that did not actually exist, as in *Snow v. Alley*, 156 Mass. 193; and *Doucette v. Baldwin*, 194 Mass. 131. *Franklin County National Bank v. First National Bank of Greenfield*, 138 Mass. 515, was decided upon its peculiar circumstances, and has no bearing here. The decision in *Boston v. Turner*, 201 Mass. 190, turned upon the proposition that the remedies given to a tax collector to enforce the payment of taxes are cumulative, and that he is under no duty to elect between them. It was assumed that otherwise his proof in bankruptcy would have been a waiver of his equitable remedy.

Accordingly we are of opinion that those of the claimants, who have proved their demands against the estate of Bangs in bankruptcy, have thereby waived any right to a charge upon this fund. The question whether this was a final election, or whether those claimants can now, upon expunging their proofs in bankruptcy, reassert their equitable rights, as was done in some of the cases above cited, has not been argued, and is not decided.

It has been found that on January 2, 1907, this fund was overdrawn by more than \$2,000. It follows that no one of the claimants can have a charge upon the fund for any deposit made before that date. The amount for which any of them is entitled to a charge after that time must be determined by taking the deposit first thereafter made of his money and adding thereto the amount of any such later deposits. But that amount must be diminished by the amount of any diminution of the fund made by withdrawals by Wells from that part of the fund which was subject to the charge. Withdrawals made by Wells for his own use or that of his firm must be treated as made from that part of the fund which belonged to him or them so far as that is practicable. But when this cannot be done, such withdrawals must, as among those claimants who are entitled to a charge upon the fund, be charged against the deposits in the order of their respective dates, the doctrine that the first withdrawals will be applied to the first deposits being followed among the claimants though not followed between them and their trustee. And when the amount subject to a charge in favor of a claimant has been diminished to any extent by the application against it of such withdrawals, it is not, nor is it ever, to be increased by any subsequent deposit by Wells or the firm of other money, not shown to have been the money of that particular claimant. *Board of County Commissioners v. Strawn*, 157 Fed. Rep. 49. And see *In re Mulligan*, 116 Fed. Rep. 715. The fund must be treated as having so far been dissipated once for all, with the result that there is no longer any equitable charge for its repayment. The fact that the firm was insolvent is of itself enough to bring about this result, and prevent the application of the rule stated in *United National Bank v. Weatherby*, 70 App. Div. (N. Y.) 279. And no claimant is to be allowed a charge or lien by reason of any part of the fund which, under the rules stated, was subject to a charge in favor of a claimant who was prior to him in time.

If the total amount that can be held by all the claimants who are entitled to a charge upon the fund thus determined exceeds the amount of the fund, then that amount is to be divided among them in proportion to the amounts of their respective charges. *McBride v. Potter-Lovell Co.* 169 Mass. 7.

If the total amount of their charges is less than the amount of this fund, then they are to receive the amount of their respective charges in full (*Hancock v. Smith*, 41 Ch. D. 456; *Baker v. New York National Exchange Bank*, 100 N. Y. 81), and the residue of the fund will be paid to the plaintiff. The case must be remitted to the master to find and state these amounts and the total amount of the fund, as this may have increased by the addition of interest.

A decree will be entered in accordance with the opinion.

So ordered.

EMIL CORMO vs. BOSTON BRIDGE WORKS.

Suffolk. January 11, 1910. — March 1, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability. Conflict of Laws. Evidence, Foreign law, Presumptions and burden of proof.

In an action of tort by an employee against his employer to recover for personal injuries received while the plaintiff was at work for the defendant in another State, the declaration contained counts under R. L. c. 106, § 71, and a count at common law. The defendant did not raise the objection that the defendant's liability should be determined by the law of the place of the accident but was content to rest his liability upon both the common and the statutory law of this Commonwealth. No evidence, therefore, of the law of the State where the injury to the plaintiff was received was introduced, but it was said that, in the absence of evidence to the contrary, the common law of the place of the accident would be presumed to be the same as that of this Commonwealth, although such presumption would not arise as to the statutory law of the other State.

In an action by an employee against his employer, a bridge building corporation, the declaration contained a count at common law alleging a negligent failure of the defendant to provide the plaintiff with safe and proper tools and appliances to use in his work. At the trial there was evidence tending to show that the plaintiff was at work with three fellow employees in hammering iron rivets into an iron bridge by the use of a pneumatic hammer, that when in its proper condition the piston of the hammer would remain at rest unless a trigger upon it was pressed, that a pneumatic hammer requires frequent cleaning in order to keep particles of dust from getting under the valve and setting the piston in motion without the trigger being pressed, that, also, the hammer should be inspected frequently because a spring which keeps the trigger up and the valve closed is likely to become weak and to cause a leaking which would put the piston in motion. There was further evidence tending to show that the hammer had not

been cleaned or inspected for a considerable period before the accident, and that, previous to the accident, the hammer, when not in use but lying on the ground, had been seen to move and twist, but there was no evidence that the plaintiff understood the inner mechanism of the hammer or was qualified to or did attach any significance to such fact. There also was evidence that, while a fellow workman of the plaintiff was holding the hammer and when there was no pressure on the trigger, the piston suddenly started and struck and destroyed the plaintiff's eye. *Held*, that it could not be ruled as matter of law either that the plaintiff was wanting in due care or that, having anticipated what occurred, he voluntarily exposed himself to the danger; *and also*, that there was evidence from which the jury would have been warranted in finding the defendant negligent in failing to perform its common law duty of providing safe appliances for the plaintiff's use and to use due diligence in keeping those which were supplied in repair.

TORT for personal injuries received by the plaintiff while in the employ of the defendant and at work in the town of Towners in the State of New York. Writ dated July 10, 1906.

The case was tried before *Brown, J.* The facts are stated in the opinion. At the close of the evidence, it was agreed by the parties that the judge should order a verdict for the defendant and report the case to this court, the defendant to pay all the expenses of the reporting of the case, and that, if this court should say that the ruling of the judge was correct, the verdict as ordered was to stand, but if this court should say that the case should have been submitted to the jury, the case was to be sent back for assessment of damages only.

R. H. Sherman, for the plaintiff.

G. W. Buck, for the defendant.

BRALEY, J. It may be assumed from the report that the plaintiff, who was described as domiciled in this Commonwealth, was hired here by the defendant, which is stated in the writ to be a foreign corporation having its usual place of business at Boston. The accident happened in the State of New York, where the plaintiff as its servant worked, helping to rivet an iron bridge in process of construction. The first and second counts of the declaration are under R. L. c. 106, § 71, now St. 1909, c. 514, § 127, for negligence of some person entrusted with superintendence either in the direction of the work or in failing to discover or remedy the defect in the works or machinery which is alleged to have caused the injury; while the third count is at common law for failure to provide proper appliances

and tools with which the plaintiff was to perform his work. At the trial no proof was offered of the foreign law, but the defendant apparently was content to rest its liability upon our law, both common and statutory, relating to its negligence and the plaintiff's due care or assumption of risk upon the issues raised by the pleadings. The action, however, being transitory, the defendant could be sued wherever found, and it is to be presumed in absence of evidence to the contrary that the common law of the place of the accident is the same upon the questions presented as our own, although this presumption does not arise as to the statutory law of a sister State. *Callender, McAuslan & Troup Co. v. Flint*, 187 Mass. 104. *Cherry v. Sprague*, 187 Mass. 113.

While building the bridge, the defendant established a compressed air plant in the vicinity to operate the pneumatic machines or hammers used to head the rivets after they had been heated and placed in position. The air from the compressor was transmitted through a metal pipe, which was connected with the hammer by a detachable rubber or cotton hose. In the cylinder, or barrel, is placed a detached, movable piston of steel about an inch in diameter and four inches in length; when the hammer is used, the air, which is admitted or shut off by means of a lever or trigger in the handle controlled by the operator, forces the piston against the rivet on which a movable cap is placed, hammering and forming the end into a head. The plaintiff, as one of a gang of four men, used one of the hammers in riveting bolts. They worked in pairs, each taking his turn in holding and operating the hammer, while the other inserted the rivets. Of the remaining two one held the rivet in place by a dolly-bar, as the head was being formed, while the fourth heated the rivets at a portable forge. It was not controverted that when the air was turned off by use of the trigger, the hammer or piston, if the machine was in proper working order, would be at rest, and there should be no danger from contact with it; but if the trigger was pressed or air was admitted, unless the hammer was in juxtaposition with the rivet, the piston would be ejected with much force.

At the time of the accident, according to testimony of the plaintiff and his witness, the machine was held by a fellow

servant with his hand underneath but not near the trigger, when the piston suddenly started, struck and destroyed the plaintiff's eye. A hammer properly constructed and in repair, after the air pressure had been turned off, would move only as the trigger was pressed, and unless some satisfactory explanation was offered by the defendant, the jury upon this evidence could find that it had become defective. *Ryan v. Fall River Iron Works Co.* 200 Mass. 188, 191. *Silverman v. Carr*, 200 Mass. 396.

It further appeared that previously when the hammer was not in use, but was lying on the ground, it had been observed to move or twist. The plaintiff moreover contended, and introduced evidence from which the jury could find, that a pneumatic hammer requires frequent cleaning, for if particles of dust get under the valve, which opens and closes by a spring moved by the use of the trigger, the valve does not entirely close when the trigger is released and the air which passes will set the hammer in motion; or, if the spring loses its elasticity from long use and space is left at the valve stem, causing it to drop down, a similar action follows. In the opinion of the plaintiff's expert a frequent examination would be necessary to ascertain whether the spring had become weak, or to discover and remove any particles of dirt which might have accumulated under or around the valve. It was admitted by Light, who testified as a witness for the defendant and who, the jury could find, was acting as the defendant's representative and among other duties had charge of the supervision of the hammers, that for a considerable period preceding the accident they had not been inspected or cleaned. Upon this evidence, in view of the nature of the agency used and the dangers which obviously might exist if the spring became impaired or the valve clogged from particles of dust arising from the manner of doing the work, and the action of the hammer at the time of the accident, it was a question of fact whether the plaintiff's injury could have been avoided if the hammer had been examined or inspected, especially when the evidence already referred to showed that with the air pressure turned on and the trigger at rest, the hammer had been seen to move when not in use. The defendant, in the prosecution of the work, was required not only to provide reasonably safe ap-

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pliances for the plaintiff's use, but by the exercise of reasonable diligence to see that they were kept in repair. A failure to perform this duty furnished evidence of its negligence at common law. *Rogers v. Ludlow Manuf. Co.* 144 Mass. 198. *Peterson v. Morgan Spring Co.* 189 Mass. 576. *Finnegan v. Winslow Skate Manuf. Co.* 189 Mass. 580. *Ruddy v. George F. Blake Manuf. Co.*, ante, 172.

The defendant, however, contends that the plaintiff was negligent and assumed the risk. If the plaintiff knew that occasionally as it lay on the ground, with the air turned on at the compressor, the hammer would move, he is not shown to have been possessed of any knowledge of the interior mechanism of the valve or spring, or of any information from which he should have known that when held by his fellow workmen it might operate without the trigger being pressed. It could not be correctly ruled as matter of law that by continuing to work with the hammer he was careless, or must be held to have anticipated what occurred, and voluntarily exposed himself to a danger which resulted in severe bodily injury. *Moyle v. D. S. McDonald Co.* 188 Mass. 499. *Arnold v. Harrington Cutlery Co.* 189 Mass. 547. *Cahill v. New England Telephone & Telegraph Co.* 193 Mass. 415. *Jellow v. Fore River Ship Building Co.* 201 Mass. 464.

The weight of the evidence or what conclusion should be reached or inferences drawn from conflicting testimony are not before us, but these considerations were solely for the jury under appropriate instructions. It being evident that the plaintiff was entitled to go to the jury upon the count at common law, the other counts need not be considered. By the terms of the report, the verdict is to be set aside and the case is to stand for trial for the assessment of damages only.

So ordered.

EDWARD J. STEWART vs. JOHN JOYCE & others.

Suffolk. November 19, 1909. — March 4, 1910.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Damages, In suit in equity to rescind sale for fraud. *Sale*, Rescission.

Where, in a suit in equity to rescind a sale to the defendant by the plaintiff of shares of the capital stock of a corporation because the sale was procured by fraud on the part of the defendant, it appears that the sale should be rescinded, but that the defendant, because he had parted with the shares before the commencement of the suit, is unable to return them to the plaintiff, and the court of equity therefore retains jurisdiction of the case for the purpose of awarding to the plaintiff the damages which he suffered from the defendant's fraud, the amount of such damages is the difference between the value of the shares on the day when the sale was made and the amount paid by the defendant to the plaintiff for them, with interest at six per cent thereon from the date of the sale to the date of the final decree. *Whether* a different rule would apply and, if so, what rule, in a case where the defendant after the filing of the bill had disabled himself from returning the shares to the plaintiff, here was not considered.

BILL IN EQUITY, filed in the Supreme Judicial Court on January 18, 1906, and amended by the filing of a substituted bill on July 18, 1906, to rescind a sale of shares of the capital stock of the Gillette Safety Razor Company, a corporation organized under the laws of the State of Maine, made by the plaintiff to the defendant Heilborn, alleged to have been acting for himself and the other defendants, on July 11, 1904, at \$1 a share, when the fair value was alleged to have been \$10 a share, such sale being alleged to have been induced by false and fraudulent representations made to the plaintiff by the defendants.

The case previously was before this court, having been reserved by a single justice upon the pleadings and the report of a master and exceptions thereto, and is reported in 201 Mass. 301. After the issuance of a rescript in accordance with that decision the case was heard by *Braley, J.*, as to the final decree.

It appeared that the defendant had no stock with which to satisfy the plaintiff by a return of shares of stock to which he would otherwise have been entitled in accordance with the rescript, and that no finding had been made by the master either as to the date as of which the market value of the stock should

be ascertained or of the market value of the stock, except on July 11, 1904, the date at which the defendant contended that the value should be ascertained. The plaintiff contended and asked that the damages should be assessed either as of the date of the decree or as of the date of the filing of the bill of complaint, with interest therefrom. A decree was entered that the plaintiff recover of the defendant Heilborn as damages the difference between the market value of the stock purchased by Heilborn from the plaintiff at the date of such purchase and the price paid therefor by Heilborn to the plaintiff, together with interest upon the amount of this difference at the rate of six per cent from the date of the purchase, July 11, 1904. The plaintiff appealed.

H. T. Richardson & H. M. Williams, for the plaintiff.

E. F. McClennen, for the defendants.

MORTON, J. The sole question in this case is whether the damages should have been assessed as of the date of the sale and transfer of the stock by the plaintiff to the defendant Heilborn, or, if as of some other date, whether that should be the date of the filing of the bill, or of the entry of the final decree. The single justice ruled that they should be assessed as of the date of the transfer to Heilborn, and a final decree was entered accordingly. The plaintiff appealed.

The plaintiff concedes that if the action were trover for conversion of the stock, or an action for breach of contract to buy or sell the stock, the damages would have to be assessed as of the date of the conversion or of the breach. He also concedes that a similar rule would apply if the action were for deceit in procuring the plaintiff to sell and transfer the stock by means of false and fraudulent representations. But he contends that a different rule should apply when the suit is in equity for a rescission of the sale for fraud on the part of the vendee, and it is held that the plaintiff is entitled to rescind and to have the stock returned to him, but the defendant is unable to return the stock and damages are awarded in lieu thereof. In such a case he contends that he is entitled to have the damages assessed as of the date when he became entitled to a return of the stock; that is, either as of the date of the filing of the bill or of the entry of the final decree, as the

case may be. He insists that in no other way can he be put by means of money damages in as good a position as he would have been in if the stock had been returned to him. And that undoubtedly is true, and if failure to obtain the peculiar relief which he came into equity for has the effect of enhancing the damages which he otherwise would have been entitled to recover, or, what amounts to the same thing, if a different rule in regard to damages prevails in equity from that which prevails at law, then his position is sound; otherwise not. We have been referred to no case in which such a rule has been laid down, and we see no ground on which it can be supported consistently with well established rules of law. The suit, though brought in equity, is in substance and effect an action of deceit. *Arkwright v. Newbold*, 17 Ch. D. 301, 320. *Smith v. Chadwick*, 20 Ch. D. 27, 68; *S. C.* 9 App. Cas. 187, 193. In equity no less than at law the plaintiff in order to recover must show that he was induced to sell and transfer his stock by means of false and fraudulent representations on the part of the defendant. At law the plaintiff is limited to the recovery of damages for the fraud thus practised upon him. In equity he can have the sale set aside and his stock returned to him so far as it is within the power of the defendant to return it. That is where the remedy in equity excels that afforded by a court of law. If the defendant is unable to return the stock, then, as incidental to the relief sought by a rescission of the sale and a return of the stock, but not otherwise, the court having jurisdiction of the cause will proceed to assess the damages sustained by the plaintiff in consequence of the wrongful act of the defendant, instead of compelling him to bring an action at law. But the rule of damages is and must be the same in one court as in the other, like the rules of evidence. No good reason can be assigned for assessing the damages as of the date of the final decree or of the filing of the bill in one case, and as of the date of the fraudulent transaction in the other. Such a rule would render or tend to render the damages remote and speculative, and is open to the same objections in equity as at law. The general rule is, no doubt, as the plaintiff contends, that the injured party is entitled to be put in as good a position as he would have been but for the wrong done him. But with

this rule there goes another, that the consequences for which the wrongdoer is liable are only those which are the direct and proximate results of his wrongdoing. Courts cannot undertake to follow to its utmost consequences the wrong that is done. It would be impracticable to attempt to do so. In this case the wrong was done when the deceit was practised, and the consequences must be measured as of that date or within a reasonable time thereafter. If, as already observed, in a case like the present the wrongdoer has the stock in his possession or control, equity will compel him to return it upon the plaintiff's putting him *in statu quo*;—not because the plaintiff is entitled to have his damages assessed as of the date when a return would have been ordered, but because as against the plaintiff the defendant has no just title to the stock and in equity and good conscience ought to return it to the plaintiff. If, however, the defendant has not the stock in his possession or control, it would be entering the realms of conjecture and speculation to assume that the plaintiff would have kept the stock if he had not been induced to part with it by the defendant's fraud, and that the damages should be assessed accordingly.

The plaintiff relies strongly on *Fowle v. Ward*, 113 Mass. 548, to which might be added *Sewall v. Boston Water Power Co.* 4 Allen, 277, *Pratt v. Taunton Copper Co.* 123 Mass. 110, and *McKim v. Hibbard*, 142 Mass. 422. He also relies on *Hayward v. Leeson*, 176 Mass. 310, 322, 323, and on *Washington Ice Co. v. Webster*, 125 U. S. 426, 439.

Hayward v. Leeson, *supra*, was a case brought to recover secret profits alleged to have been made by a promoter, and has no bearing upon the question before us except so far as it affords an illustration of the rule that the injured party is entitled to be put in as good a position, so far as practicable, as he would have been in but for the wrong done him. Even in that case it is said that "ordinarily the damages are to be assessed as of the date of the taking." (p. 322.) The case of *Washington Ice Co. v. Webster*, *supra*, was an action of replevin, and the question was whether the defendant in replevin who had judgment in his favor was entitled in an action on the replevin bond to recover damages as of the date of the taking or as of the entry of judgment in his favor in the replevin

suit. It was held that the damages were to be assessed as of the date of the taking. Obviously that case does not help the plaintiff. In *Fowle v. Ward*, 113 Mass. 548, the defendant wrongfully disposed of shares belonging to the plaintiff which, as the court said in the opinion, "ought to be in the defendant's hands at this moment," and a decree was entered for a sum as damages which would enable the plaintiff to replace the shares which had been taken from him. In the case before us the defendant was not bound to have the stock in his hands when the bill was brought, or at any other time. Until the plaintiff elected to avoid the sale the defendant could rightfully sell and dispose of the stock to an innocent purchaser, and, as it is in effect found, had done so long before the bill was brought. The case before us is therefore widely different from *Fowle v. Ward*, *supra*, and from such cases as *Sewall v. Boston Water Power Co.*, and *Pratt v. Taunton Copper Co.*, *supra*. It also differs from cases relating to specific performance, even if we assume that, in case of a partial or total inability to perform, the damages would be assessed as of the date of the bringing of the bill or of the entry of the final decree, of which there may be some doubt. See *Woodbury v. Luddy*, 14 Allen, 1; *Davis v. Parker*, 14 Allen, 94, 104; *Lexington Print Works v. Canton*, 171 Mass. 414; *Wonson v. Fenno*, 129 Mass. 405; *Milkman v. Ordway*, 106 Mass. 232; *Pingree v. Coffin*, 12 Gray, 288; *Neppach v. Oregon & California Railroad*, 46 Ore. 374; *S. C.* 7 Am. & Eng. Ann. Cas. 1035.

To avoid misconception we add that if the defendant had disabled himself from conveying the stock by a sale and transfer after the bill was brought, a different rule from that which we have laid down for this case might apply. But that question is not before us, and we have not therefore considered it.

The result is that the decree must be affirmed.

So ordered.

MILON S. JENKINS vs. TRUSTEES OF ANDOVER THEOLOGICAL SEMINARY.

Essex. January 18, 1910. — March 4, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Mortgage, Of real estate. Adverse Possession. Limitations, Statute of. Payment. Evidence, Presumptions and burden of proof.

If a man makes a mortgage of a farm, purporting to convey the whole title, whereas his interest in it is a remainder after the death of his father who holds it as tenant by the curtesy, and if after the making of the mortgage the mortgagor continues to live upon the mortgaged property operating the farm in connection with his father until a period of more than twenty years has elapsed after the maturity of the mortgage note, during which no payment of principal or interest has been made upon the mortgage and no acknowledgment of the mortgage or promise to pay has been made, such sharing by the mortgagor in the occupation by his father is not possession of the property by the mortgagor, and cannot be relied upon to establish a title in him at common law by adverse possession against the mortgagee, nor can it be made the basis of proceedings under R. L. c. 182, § 15, to have the mortgage declared to be discharged.

The fact that an action upon a note secured by a mortgage is barred by the statute of limitations does not affect the validity of the mortgage securing the payment of the note.

The presumption that a witnessed promissory note has been paid when it has been due for more than twenty years is a presumption of fact which can be rebutted by any legal evidence showing that the note has not been paid.

In a suit in equity against the assignee of a mortgage on the plaintiff's land seeking the cancellation and discharge of the mortgage, which had been given to secure a witnessed note, which was payable more than twenty years before the filing of the bill and on which no payment of principal or interest had been made during that time, the plaintiff contended that it must be presumed that the note had been paid. It appeared that, when the plaintiff gave the mortgage, his interest in the land was that of a remainderman, subject to a life estate in his father who was a tenant by the curtesy, and that the plaintiff after giving the mortgage lived with his father upon the land until the death of his father, which occurred less than three years before the filing of the bill, and that thereafter the plaintiff occupied the land as his own, that ever since the making of the mortgage the mortgage and the note were and continued to be in the custody of the mortgagee or of the defendant as his assignee, that the mortgagee and the defendant frequently wrote to the plaintiff and received no answer, and that they had refrained from taking steps to foreclose the mortgage because they were informed by counsel that they could do nothing until the death of the life tenant, that upon the death of the plaintiff's father they demanded payment from the plaintiff, who made no pretense that the note had been paid, although he refrained from making

any promise or any express recognition of the validity of the mortgage, and spoke of his hard luck and his poverty, that the plaintiff was present at the trial and did not take the stand to testify, and it did not appear by the record that he ever had said that the note was paid. *Held*, that, giving due weight to the presumption of payment arising from the lapse of time, the evidence showed so strongly that the note had not been paid, that a finding of a trial judge to the contrary would be reversed as clearly wrong; and that, the note not having been paid, the mortgage stood as security for the debt.

HAMMOND, J. This is a bill in equity in which the plaintiff asks the court to order the defendants to cancel and discharge a mortgage held by them upon certain real estate owned by him, and to release the property "from the lien thereof."

The bill sets out the plaintiff's title to the land,* the mortgage thereon given by him to the trustees of Phillips Academy (from whom the defendants claim as assignees) and the further averments (contained in the sixth paragraph) "that since the twenty-third day of May, 1884, no sum has been paid by him upon said mortgage as principal or interest, and no sum has been paid as rent for said premises by him to the mortgagees or to any person entitled to the estate of said mortgagees or representing the interests of said mortgagees, and that no demand has been made upon him for the payment of any part of said principal or the interest accrued thereon, if any such has accrued, and that during all the time from the said twenty-third day of May, 1884, the plaintiff has been operating said farm in connection with his father, the said Benjamin F. Jenkins; and that to the best of the plaintiff's knowledge no demand was ever made during said period from the twenty-third day of May, 1884, to the present upon said Benjamin F. Jenkins for the payment of the mortgage debt or any part thereof or for interest on the said mortgage debt, and that no part of the mortgage debt, or interest, or rent, was ever paid by the said Benjamin F. Jenkins dur-

* The mortgaged property consisted of a farm and farm buildings which belonged to Abbie F. Jenkins, who died intestate on April 28, 1872. The plaintiff was the only child of Abbie F. Jenkins and of her husband Benjamin F. Jenkins, who died on March 24, 1907. The bill was filed on November 22, 1909. The mortgage and the mortgage note were dated May 23, 1883. The note was for \$3,000 and interest and was due on May 24, 1884. The note was witnessed. In the mortgage deed the plaintiff covenanted that he was lawfully seised in fee simple of the granted premises, and that they were free from all incumbrances.

ing his lifetime." Then, after setting out that the defendants have advertised the premises for sale under the power contained in the mortgage, it alleges "that by reason of the foregoing premises the assignees of said mortgage have no valid claim upon said premises under said mortgage, and no valid claim against the plaintiff upon the note secured by said mortgage, and that said assignees have no claim upon or any right, title or interest in the said premises, and no authority or right to execute said power of sale by the sale of said premises as advertised."

The answer substantially admits the title of the plaintiff and the delivery of the mortgage, all as alleged in the bill. The defendants further admit that "since the twenty-third day of May, 1884, no sum has been paid by the plaintiff or by Benjamin F. Jenkins upon said mortgage as principal or interest; that no sum has been paid as rent for said premises by the plaintiff or by the said Benjamin F. Jenkins to the mortgagees or to any persons entitled to the estate of the said mortgagees or representing the interest of said mortgagees, and that the plaintiff has been in possession of said premises as alleged in the sixth paragraph of the plaintiff's bill." They deny that the mortgage is invalid and aver that they are the holders thereof by assignment from the original mortgagees, that no part of the principal or interest has been paid, that they have made repeated demands upon the plaintiff, and that at various times he has promised the defendants to pay the same, and that the mortgage is a valid and subsisting lien upon the real estate.

There was a hearing before a judge of the Superior Court,* at which evidence, some oral and some written, was introduced. Upon the pleadings and the evidence there was a decree for the plaintiff as prayed for, and the case is before us upon the defendants' appeal therefrom.

It is to be noted that nowhere does the bill allege that the debt secured by the mortgage has been paid. The plaintiff's only ground for relief as set out in his bill is that stated in the sixth paragraph, as hereinbefore quoted. In his brief he uses the following language: "The plaintiff's ground for equitable relief, temporary and permanent, was that the mortgage was in-

* *Hardy, J.*

valid for the reason that more than twenty years had elapsed since any payment or acknowledgment of the mortgage had been made by the plaintiff, or any promise made sufficient to rebut the presumption that the debt secured by the mortgage had been paid. . . . In the defendants' answer no claim is made and at the trial no evidence was introduced of any payment by the plaintiff or any promise to pay or any act from which such payment or promise might be inferred." Upon this ground alone did the plaintiff rest his rights to the relief for which he asked.

There can be no doubt that at common law continued possession by a mortgagor and those under whom he claims for twenty years after the mortgage debt is payable, without any entry or claim by the holder of the mortgage, creates a presumption that the mortgage debt is paid. *Howland v. Shurtleff*, 2 Met. 26. But it is not a conclusive presumption of law, but simply one of fact, which may be controlled by evidence of part payment or other circumstances warranting a conclusion that the debt was not paid. *Cheever v. Perley*, 11 Allen, 584, 586. In this last case it was said by Colt, J. (p. 587), that to control this presumption "some positive act of unequivocal recognition, like part payment or a written admission, or at least a clear and well identified verbal promise or admission, intelligently made within the period of twenty years, is required."

If this principle of law were applicable to this case there would seem to be no valid defense to the bill. Before the filing of the bill more than twenty years had elapsed since any sum had been paid upon the mortgage, and the evidence might fairly have been regarded by the trial judge as falling far short of that required by the rule laid down as above stated in *Cheever v. Perley*. But in the present case there is lacking one condition essential for the application of this rule, and it so happens that it is the very condition upon which the presumption is chiefly based. The condition is that the mortgagee shall have suffered the mortgagor to remain in possession twenty years after condition broken, without taking possession to enforce his claim, or in other words, that the mortgagee having the right to enter upon the land shall have allowed the mortgagor, or those under whom he claims, to remain in possession twenty years without any recognition of the validity of the mortgage.

As stated by Cushing, J., in *Ayres v. Waite*, 10 Cush. 72, 76, "Such lapse of time, and the neglect on the part of the mortgagee to enforce the claim, while another is exercising an adverse possession, are grounds for a presumption in fact, which, unexplained and uncontrolled, authorize a jury to infer that the mortgage is satisfied." It is analogous to the principle of acquiring title by adverse possession.

In the case before us the mortgagor held the estate subject to the life estate of his father holding as tenant by curtesy, and the mortgage, although expressed to be of the whole estate, in reality covered only the remainder after the life estate. It is true, as the plaintiff alleges in his bill, that he always had lived upon the farm, and that ever since the mortgage came due he had been operating the farm in connection with his father, but in view of the existence of his father's life estate this allegation of possession, so far as existing during the lifetime of his father, must be regarded as referring to possession, not as a tenant in fee, because he was not such, nor as a remainderman, because as such he had no right to possession, but as under the life estate of his father who alone had the right. And the admission in the answer that the plaintiff "has been in possession of said premises as alleged in the sixth paragraph" of the bill is no broader than the allegation.

Such a possession is not of the real thing actually conveyed to the mortgagees. With such a possession the mortgagees could not interfere. Under the mortgage they acquired no actual right to enter and take and retain possession. The time in which they legally could do that did not come until after the death of the life tenant, which occurred in March, 1907. This is not a case where the mortgagor and those claiming under him hold possession for the required twenty years after breach of condition, but where the mortgagor was in under the right of the life tenant, a right not legally covered in fact by the mortgage. The possession was that of the life tenant, whose title came not from the mortgagor but was superior to the latter's title so far as respected the right of possession. In failing to exercise a right the defendants did not have, the defendants were not in fault. One of the main and essential conditions of the rule being absent, the rule is not applicable

to this case. For the same reason the case is not within the provisions of R. L. c. 182, § 15. If it were, a different result might be reached.

It may be argued however in behalf of the plaintiff that even if this rule upon which he relies is not applicable, still there is another rule upon which he can prevail, and that is the common law principle, applicable generally as well to debts secured by mortgages as to debts not secured, that after twenty years after a debt is matured it is presumed to be paid. *Oswald v. Legh*, 1 T. R. 270. This rule is called a "familiar common law principle" in *Denny v. Eddy*, 22 Pick. 583, 585, and has been several times recognized by this court. It exists independently of the narrow rule specially applicable to mortgages, which rule we have been considering.

A mortgage of real estate is a conveyance, and it stands until the debt in the eye of the law is paid; and that is so even if the evidence of the debt be changed, as for instance by a renewal note, provided always that the debt be and remain the same debt, (*Pomroy v. Rice*, 16 Pick. 22;) and even if the personal liability of the mortgagor be extinguished by the statute of limitations. If the debt be paid, however, the mortgage is satisfied. If, then, by the rules of law the debt secured by the mortgage under consideration is to be regarded as paid, then irrespectively of the possession or the right of possession, the mortgage must be discharged. The debt was in the form of a note dated May 23, 1883. It became due May 24, 1884, and the last indorsement is dated April 21, 1885, being of interest to April 1, 1885. If after the expiration of the twenty years an action had been brought against the maker of this note, (the plaintiff in this suit,) to enforce his personal liability, he could have set up two separate defenses, one the statute of limitations and the other, payment. And if the evidence had been the same as it is in the case before us the defense under the statute of limitations would have been complete. R. L. c. 202, § 1, cl. 3; §§ 12, 13. But a verdict for him on that issue would not of itself entitle him to a cancellation and discharge of the mortgage because the mortgage, as above stated, stands, even although the action to enforce personal liability on the note be barred by the statute of limitations. The result would be different had the defense of payment

prevailed. Upon that issue also, the period of twenty years is an important fact, but in a somewhat different way. It raises a presumption that the note has been paid, and unless controlled by other evidence the presumption is conclusive. And that is so even if in truth the note has not been actually paid. Unless the presumption is thus controlled the note is regarded as in law paid and the mortgage is satisfied.

But this presumption being one of fact can be controlled by evidence; and any kind of evidence tending to show that the note has not been paid is admissible. Such evidence does not need to be of the kind required to take the case out of the statute of limitations, (*Day v. Crosby*, 173 Mass. 433;) and it may be sufficient to control the presumption even although it in no respect contains any "positive act of unequivocal recognition" or even "a clear and well identified verbal promise or admission, intelligently made within the period of twenty years," characteristics hereinbefore quoted from Colt, J., in *Cheever v. Perley*, 11 Allen, 584, 587, as requisite where the mortgagor has been in possession twenty years. On the contrary, as stated by Colburn, J., in *Walker v. Robinson*, 136 Mass. 280, 282, a case in which the question was whether a judgment had been paid, "The presumption declared in this statute [said in *Denny v. Eddy*, *ubi supra*, to be a mere statutory enactment of the common law presumption that after twenty years the debt is presumed to be paid] may be rebutted by evidence showing that the judgment has not in fact been paid, but remains justly due. *Denny v. Eddy*, 22 Pick, 533. *Knapp v. Knapp*, 134 Mass. 353. *Brewer v. Thomes*, 28 Maine, 81. This being so, we see no reason, and are not aware of any controlling authority, for requiring any particular kind of evidence to rebut the presumption. We are of opinion that any legal evidence having a tendency to show that the judgment has not been paid or satisfied is competent; and that, if the evidence furnished is such as to produce conviction that the judgment has not in fact been paid or satisfied, it is sufficient to rebut the presumption. *Brewer v. Thomes*, *ubi supra*." And accordingly it was held in that case that the evidence was sufficient to rebut the presumption of payment although it did not appear that anything had been said to the judgment debtor about the execution, or that he ever had

said anything about it, or even known of its existence. In *Day v. Crosby, ubi supra*, it was held that the evidence controlled the presumption although it contained no promise on the part of the debtor nor any positive act of unequivocal recognition by him.

The case is before us upon appeal. We are not to disturb the finding of the trial judge unless it clearly appears to be wrong. But the introductory question here is whether he made any finding at all upon this question. It nowhere seems to have been asserted by the plaintiff, either in the bill or in the evidence, that the note actually had been paid. He seems to have rested his case, as above stated, upon the presumption as to payment where the mortgagor has been in possession without any recognition of the indebtedness, and the contention that the evidence to control that presumption did not stand the tests required, as stated in *Cheever v. Perley, ubi supra*, to rebut the presumption. And if the rule applicable to such a case were the rule upon which the case should be decided, we should not feel that the finding was wrong. But when the question is not whether the evidence shows "some positive act of unequivocal recognition, . . . or at least a clear and well identified verbal promise or admission, intelligently made within the period of twenty years," but rather whether it shows that the note has not been paid, we think that the finding that it has been paid, if such a finding was indeed made, was clearly wrong.

We proceed to state the reasons for coming to this conclusion upon the evidence. The uncontradicted evidence shows the making of the mortgage and that both the note and the mortgage have been in the custody of the original mortgagees or their assignees, substantially ever since, and that all that time the mortgage has been regarded by the holders thereof as a valid subsisting mortgage; that they frequently wrote to the plaintiff and received no answer; and that they refrained from taking steps to foreclose because they were informed by counsel that they could do nothing until the death of the life tenant. When confronted after the death of his father with a demand for payment, the plaintiff never made any pretense that the mortgage had been paid, although he refrained from making any promise or express recognition of it as valid. He spoke of his hard luck

and of his poverty. If he had paid the mortgage it is inconceivable that he should not have said so. The note was in the hands of the holders of the mortgage, the place where it ought not to be if paid. Moreover, although as far as appears by the record the plaintiff was present at the trial, he did not take the stand and testify. So far as appears by the record he never has said that the note was paid. Without going further into detail, it is sufficient to say that giving due weight to the presumption, the evidence was overwhelmingly in favor of the proposition that the note had not been paid, and a finding to the contrary would have been clearly wrong. The note not having been paid the mortgage stands as security for the debt.

Bill dismissed with costs.

The case was submitted on briefs.

J. P. Sweeney & L. S. Cox, for the defendants.

W. S. Knox & J. G. Walsh, for the plaintiff.

COMMONWEALTH vs. ALVAH G. WHEELER.

SAME vs. WILLIAM FOSS.

SAME vs. HARRY S. WALCOTT.

Middlesex. January 17, 1910. — March 22, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Milk. Constitutional Law.

The provisions of R. L. c. 56, §§ 56, 57, making it a crime to sell or have in possession with intent to sell milk which is not of good standard quality, as amended by St. 1908, c. 648, which provides that "milk which, upon analysis, is shown to contain less than twelve and fifteen hundredths per cent of milk solids or less than three and thirty-five hundredths per cent of fat, shall not be considered of good standard quality," are constitutional.

In a prosecution under R. L. c. 56, §§ 56, 57, as amended by St. 1908, c. 648, for having in possession with intent to sell milk which contained eleven and sixty-five hundredths per cent of milk solids and no more, evidence offered, to show that the defendant did not know and had no reason to know that the milk in his possession contained less than the prescribed quantity of milk solids, is immaterial.

In a prosecution under R. L. c. 56, §§ 56, 57, as amended by St. 1908, c. 648, for having in possession with intent to sell milk which contained eleven and sixty-five hundredths per cent of milk solids and no more, evidence offered, to show

that the milk in the defendant's possession was not deleterious or injurious to health and that it was nutritious and beneficial as an article of food, is immaterial.

In a prosecution under R. L. c. 56, §§ 56, 57, as amended by St. 1908, c. 643, for having in possession with intent to sell milk which contained eleven and sixty-five hundredths per cent of milk solids and no more, evidence offered, to show that the milk in the possession of the defendant was without adulteration and just as it came from properly fed cows in sound health, is immaterial.

KNOWLTON, C. J. These are prosecutions under the R. L. c. 56, §§ 56, 57, as amended by the St. 1908, c. 643. The last of these sections makes punishable selling, exchanging or delivering, or having in custody or possession with intent to sell, exchange or deliver, milk which is not of good standard quality. The amendment provides that, in prosecutions under these and certain other sections, "milk which, upon analysis, is shown to contain less than twelve and fifteen hundredths per cent of milk solids or less than three and thirty-five hundredths per cent of fat, shall not be considered of good standard quality." Each of the defendants admitted that, at the time alleged in the complaint, he had in his possession, with intent to sell it, certain milk which contained eleven and sixty-five hundredths per cent of milk solids and no more. The jury found each of the defendants guilty, and the cases were reported to this court upon questions of law raised at the trial. These questions all relate to the constitutionality of the statute. They are in the form of different requests to rule that the statute is unconstitutional, and of offers of evidence which were intended to show the unconstitutionality of the law.

The sections referred to are a part of an elaborate system of legislation regulating the sale of milk, particularly directed to the prevention of the sale of adulterated or unwholesome milk. In considering these statutes we must take into account matters of common knowledge, and facts and opinions which fairly may be presumed to have influenced the action of the Legislature.

Milk is a very important article of food, which enters largely into the sustenance and development of children. It is the natural food of infants for a considerable time after their birth, and the milk of the cow is often used to supply the deficiency of milk from the mother. Probably there is no other article of diet the purity and good quality of which are so important to the life and

health of the people, and especially to the life and health of young children, as are the purity and good quality of milk. It is also very easy to adulterate it, and it may be adulterated, especially by the addition of water, in such a way that nothing but a chemical analysis will detect the adulteration. The Legislature, in the interest of the public health, has enacted laws intended to enable the people to obtain milk of good quality, that is free from adulteration. No one can question the propriety of legislation upon this subject. If statutes are directed to this end, the methods adopted for accomplishing the object desired, so long as they have some manifest relation to the object, must be left to legislative determination. Not only in Massachusetts, but in several other States, the establishment of a standard founded on the quantity of milk solids and of fat contained in the milk has been adopted as the best way of preventing adulteration, and of securing for purchasers milk whose quality can be relied upon. *Commonwealth v. Keenan*, 139 Mass. 193. *Commonwealth v. Evans*, 132 Mass. 11. *Commonwealth v. Vieth*, 155 Mass. 442. *People v. Cipperly*, 37 Hun, 319, and 101 N. Y. 634. *State v. Smyth*, 14 R. I. 100. *State v. Crescent Creamery Co.* 83 Minn. 284; 54 L. R. A. 466. *State v. Campbell*, 64 N. H. 402. In each of the cases from other courts cited above, the constitutionality of such legislation has been affirmed. It is a familiar exercise of the police power for the prevention of fraud and the promotion of the public health. See also *Shivers v. Newton*, 16 Vroom, 469; *Powell v. Pennsylvania*, 127 U. S. 678; and *State v. Addington*, 77 Mo. 110.

The defendants offered to prove that they did not know and had no reason to know that the milk contained less than the prescribed quantity of milk solids. This was immaterial. It has often been decided that, in the public interest, the burden of ascertaining at his peril whether an article that he sells is within the prohibition of a criminal statute may be put upon the seller. *Commonwealth v. Farren*, 9 Allen, 489. *People v. Kibler*, 106 N. Y. 321.

They also offered evidence that the milk in their possession was not deleterious or injurious to health, and that it was nutritious and beneficial as an article of food. This, if proved, would not have shown that the law was invalid. The fact that a cer-

tain kind of milk is not injurious to health, and that it is somewhat nutritious and beneficial, as an article of food, if used discreetly, with full knowledge of its qualities and deficiencies, is not enough to deprive the Legislature of its power to forbid the sale of it, if it would be likely to be used to commit frauds upon purchasers who might buy and use it, relying upon its supposed possession of a larger proportion of nutritious qualities, and if such use of it would be likely greatly to injure the public health, and particularly the health of young children. The Legislature might believe that the authorized sale of such milk would open so wide a door to the commission of frauds upon the community, and would be so injurious in its consequences, that such sales should be prohibited. And this, too, notwithstanding that such milk might be used without detriment by one who knew all about it, and might be nutritious, and under certain circumstances beneficial as an article of food.

The offer to prove that the milk was without adulteration, and just as it came from properly fed cows in sound health, is governed by the same considerations. As was said in the opinion in *State v. Campbell*, 64 N. H. 402, "The statute tends to discourage the breeding of a certain class of cattle for the supply of the milk market. The difficulty of guarding against the adulteration of milk may have influenced the Legislature in fixing a standard of richness. Practically it makes no difference whether milk is diluted after it is drawn from the cow, or whether it is made watery by giving her such food as will produce milk of an inferior quality, or whether the dilution, regarded by the Legislature as excessive, arises from the nature of a particular animal or a particular breed of cattle. The sale of such milk to unsuspecting consumers for a price in excess of its value is a fraud which the statute was designed to suppress. It is a valid exercise by the Legislature of the police power for the prevention of fraud and the protection of the public health, and as such is constitutional." Similar principles have been applied to the sale of oleomargarine and other articles, which in themselves, if sold with a true representation of their character, are not objectionable, and are valuable. *Commonwealth v. Huntley*, 156 Mass. 236. *Powell v. Pennsylvania*, 127 U. S. 678.

None of the evidence offered and excluded goes far enough to

meet all the considerations upon which the Legislature may have acted. It cannot be contended that the statute was not aimed at the protection of the public in a field over which the State has supervision. Nor can it be contended that the legislation has not a manifest and direct relation to the objects intended to be accomplished. It follows that the statute is constitutional.

Verdicts to stand.

H. Parker, for the defendants.

J. J. Higgins, District Attorney, for the Commonwealth.

MABEL B. WINANS vs. ANTHONY V. WINANS.

Essex. November 5, 1909. — March 28, 1910.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Domicil. Marriage and Divorce.

One, who has come into this Commonwealth with the intention of residing here permanently and without any intention of returning to a former place of abode and remains with his wife at a hotel in a city in this Commonwealth for about two weeks, entertaining friends and looking around to find a suitable house in which to live permanently in the suburbs of the city, has acquired a domicil in this Commonwealth, although in no particular city or town.

If a man comes here with his wife after their marriage in New York for the purpose of making his home permanently in this Commonwealth, although he is undecided as to the city or town in which he will reside, and remains at a hotel in a city of this Commonwealth for less than two weeks, looking around for a house in the suburbs in which to live permanently, after which he and his wife leave for a health resort in another State at the request of his mother, who is ill there, and he, before leaving the city in this Commonwealth, authorizes his wife's sister to find a suitable apartment for him and his wife in a certain town adjoining that city, and she does so, and he afterwards sends his clothes there, but when he is on his way there with his wife stops off in New York, and thereafter never rejoins his wife or returns to this Commonwealth, he has acquired a domicil in this Commonwealth; and, at the trial of a libel against him for divorce, a finding by the trial judge that the libellee and his wife never "lived together as husband and wife in this Commonwealth" within the meaning of R. L. c. 162, § 4, is not warranted in law.

MORTON, J. This is a libel for divorce. The libellee was duly served and appeared, but was subsequently defaulted. Upon

the evidence before him the presiding judge * “found and ruled that the parties never lived together as husband and wife in this Commonwealth within the meaning of the statute and on that ground ordered that the libel be dismissed,” and at the request of the libellant reported the case to this court. If on the facts found by him the finding was not warranted in law, a decree *nisi* on the ground of desertion is to be entered; otherwise, the libel is to be dismissed.

So far as the question is one of fact the presiding judge has determined it adversely to the libellant. But the facts upon which he based his conclusion that the libel should be dismissed have all been reported by him, and the question whether he was wrong in ruling as he did becomes therefore a question of law.

The statute provides that “A divorce shall not, except as provided in the following section, be decreed if the parties have never lived together as husband and wife in this Commonwealth.” R. L. c. 152, § 4. The exception referred to is immaterial so far as this case is concerned. The libellant concedes that it must appear that the parties were domiciled in this Commonwealth in order to satisfy the requirement that they shall have lived together here as husband and wife. *Ross v. Ross*, 103 Mass. 575. *Weston v. Weston*, 143 Mass. 274. The question then is whether the presiding judge was wrong in finding, as he must have found, that the parties were not domiciled in Massachusetts.

It is plain that the libellant never lost her domicile in this Commonwealth, except by reason of her domicile following that of the libellee, and we therefore need not consider further the facts in regard to her status. Was the presiding judge wrong in finding that the libellee did not acquire a domicile here? The parties were married in New York city. The domicile of the libellee before marriage, as the judge has found, apparently had been in New York; and certainly, as he further found, it never had been in Massachusetts. The libellee had no business or family ties in New York and no fixed place of abode there or elsewhere, but roomed in various hotels in New York city, when not travelling with his mother, who spent her time in health resorts. He was upwards of forty years of age and had no occu-

* *Fox, J.*

pation. The remainder of such fortune as he had was involved in litigation in New York city, and he was heavily in debt there. These are all the facts found in regard to the libellee's domicile before marriage, and his condition and circumstances, and they show conclusively, it seems to us, that he had no fixed place of abode in New York city and no family or business or other ties to keep him there. His domicile, if he had one there, would seem to have been of the most unsettled character. Indeed the presiding judge goes no farther than to find that his domicile before marriage "apparently" had been in New York, as though the matter was not free from doubt. Under such circumstances the acquisition of a new domicile or a change of domicile will be much more easily and readily inferred than when one has a fixed place of abode and a family and an established business, and associations more or less deeply rooted and permanent. A few days after the marriage the libellee and his wife came to Boston to the Hotel Touraine, where they stayed entertaining their friends and looking around for a house in which to live permanently. They examined various places in the suburbs, but made no choice. The libellee said that he liked Boston and expected to enjoy living there. After they had been in Boston less than two weeks they went to a health resort in Virginia at the request of the libellee's mother, who was ill there. Before leaving Boston the libellee requested his wife's sister, who lived in Boston, to find a suitable apartment to be occupied by himself and his wife on their return. The sister procured an apartment in Brookline, to which the greater part of the libellee's clothing, which, so far as appears was all the personal effects that he had, was sent, and for which he and his wife started when they left Virginia on their return about a month later. On the way back from Virginia the libellee, who had expressed uneasiness about his financial affairs and a desire to see his lawyer, stopped off in New York, at his wife's suggestion, to see the lawyer. He put the libellant and her daughter by a former marriage into the train for Boston and told her he would be in Boston in two days. The libellant never saw him afterwards although he wrote expressing his intention to come. The presiding judge found, as he could not very well have helped finding, it seems to us on these facts, that the parties intended to take up their residence in this Com-

monwealth when they came to Boston to the Hotel Touraine. He found that they did not intend to live permanently in Boston but in some suburb when a suitable place of residence could be found. He was not satisfied that the libellee had any intention of returning to this Commonwealth to live with his wife when he parted from her in New York.

In order to acquire a domicile both the fact and the intent must concur. Actual residence and the intention to remain either permanently or for an indefinite time without any fixed or certain purpose to return to the former place of abode are required to constitute a change of domicile. The length of the residence is immaterial provided the other elements are present and are found to exist. A day or an hour, it has been said, will suffice for the acquisition of a domicile. Jacobs, *Law of Domicil*, § 134, note. In this case, when the libellee came to Boston with his wife he intended, as the presiding judge has found, to reside permanently in this Commonwealth. There was no *animus revertendi* on his part, and his intention to reside here was not contingent on his finding a suitable place of residence, but the finding of a suitable place of residence was rendered necessary by his determination to take up his abode permanently in this Commonwealth. He did not intend to reside in Boston. But having come here with the intention to remain and with no fixed or certain purpose to return to New York, the place where he was for the time being must be regarded, we think, as his home or domicile unless it can be said that he did not acquire a domicile here until he had selected the place where he intended to reside permanently. *Wilbraham v. Ludlow*, 99 Mass. 587. *Whitney v. Sherborn*, 12 Allen, 111. We do not regard it as necessary that he should have done that. If he had been *in itinere* on his way from New York to some city or town in this State where he had decided to live, and had stopped for a few days in Boston entertaining friends and then had gone to Virginia and never had returned to this State, so that he in fact never reached the place where he intended to reside, the case would have stood differently. *Briggs v. Rochester*, 16 Gray, 337. In that case the fact and intent would not have concurred until he reached his predetermined place of abode, which he would not have done. So, if he had been passing through this Commonwealth to some town

or city in another State where he intended to make his home, and had remained for a few days at the Hotel Touraine, or if he had been here for some temporary purpose, like a wedding journey for instance, it is clear that he would not have acquired a domicile in this Commonwealth. *Shaw v. Shaw*, 98 Mass. 158. But this case differs from either of the cases thus supposed. In the case before us the libellee came here with his wife for the purpose of making his home in this Commonwealth, though he was undecided as to the particular place in which he would reside. For aught that appears he would have remained here except for his mother's illness which unexpectedly called him to Virginia. He had no intention to return to New York. An apartment was selected for him and his wife in Brookline, and he took possession of it by sending his clothing to it, though he never in fact occupied it, as to which see *Williams v. Roxbury*, 12 Gray, 21. Under such circumstances we think that the libellee must be deemed to have acquired a domicile in this Commonwealth and to have lived here with his wife as husband and wife within the meaning of the statute. He was here for a short time only, it is true, but, as we have seen, the acquisition of a domicile does not depend on the length of the residence and a domicile may be acquired in another State or country even if the party has not determined in what particular place he will take up his residence. As Chitty, J., said in *Craignish v. Hewitt*, [1892] 3 Ch. 180, 192, "A man may be domiciled in a country without having a fixed habitation in some particular spot in that country." See also *Bell v. Kennedy*, L. R. 1 H. L. (Sc.) 307, 320, per Lord Westbury; *White v. Tennant*, 31 W. Va. 790; *Bradley v. Lowry*, 1 Speers, (Eq.) 1; Dicey, Conflict of Laws, (2d ed.) 98 *et seq.*; Jacobs, Law of Domicil, § 184. For the purposes of taxation or of settlement under the pauper laws one must be an inhabitant of or have a domicile in some particular municipal division. *Briggs v. Rochester*, *supra*. *Colton v. Longmeadow*, 12 Allen, 598. But all that is required to give the courts jurisdiction in matters of divorce is that the parties shall have lived together as husband and wife in the Commonwealth, that is, that they should have had a domicile here. Parties who have come into this Commonwealth for the purpose of residing here permanently, without any intention to

return to their former places of abode, and who are looking around to find a suitable place in which to live, cannot be said to be *in itinere*. Nor can their former domicile be said to adhere to them until they have fixed upon a place of abode in this Commonwealth. They have abandoned their former domicile without any intention of returning, and with the intention of taking up their residence here either permanently or for an indefinite time; and from the nature of the case their domicile must be, as already observed, where they are for the time being although they do not intend to make their home in that particular place but do mean to make it in the Commonwealth into which they have removed. The fact that the libellee may have had no intention of returning to this Commonwealth to live with his wife when he parted from her in New York is immaterial if he had previously acquired a domicile here. The case before us differs from *Olivieri v. Atkinson*, 168 Mass. 28, and similar cases, inasmuch as it is expressly found in this case that it was the intention of the party whose domicile is in question to reside permanently in this Commonwealth.

The result is that in accordance with the report a decree *nisi* on the ground of desertion will be entered for the libellant.

So ordered.

C. N. Barney, for the libellant.

No counsel appeared for the libellee.

THERESA HEALY vs. GILCHRIST COMPANY.

Suffolk. January 17, 18, 1910. — March 23, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

It is not the duty of the proprietor of a retail store, in a department of which a new floor is being laid while business is being carried on, to warn an intelligent saleswoman of mature years employed by him in this department that she must look out for a plank, which is lying nearly flat on the floor with one end of it resting on the edge of the new upper surface of the floor that is being laid, and must be careful to step over it so as not to stumble; and a failure to give such an unnecessary warning is not evidence of negligence.

TORT for personal injuries sustained by the plaintiff on October 14, 1904, while in the employ of the defendant as a saleswoman on the second floor of the defendant's store on Washington Street in Boston. Writ dated February 14, 1905.

In the Superior Court the case was tried before *Bishop, J.* The facts shown by the evidence are stated in the opinion. The judge ruled that there was not sufficient evidence to warrant a jury in finding for the plaintiff, and ordered a verdict for the defendant. The plaintiff alleged exceptions, which after the death of *Bishop, J.*, were allowed by *Pierce, J.*

J. F. Cronan, for the plaintiff.

W. I. Badger, (*W. H. Hitchcock* with him,) for the defendant.

RUGG, J. The plaintiff was a saleswoman in the employ of the defendant. The latter was laying a floor over what had before been a stairway. After the lining floor of plank had been laid over the entire space and a covering floor about seven eighths of an inch in thickness on top of this over a part of the space, the department in which the plaintiff worked was moved to the place, and the business of selling goods was there carried on. Against the edge of the covering floor a plank nine inches wide and two and one half inches thick, and a number of feet in length, was laid flat without being nailed, one end resting on the lining floor, and the other on the covering floor. The purpose of this arrangement is not stated, but it may have been for protection of the upper flooring. This was inside a quadrangular space mostly enclosed by tables and cases. The plaintiff began work under these conditions on Wednesday. During that night additional covering floor was laid, the plank being as before laid next its edge. No more covering floor was laid on Thursday night, and the plank on Friday morning was in the same place as on Thursday. During Friday morning while the plaintiff was walking with some goods on her arm from a case on the lining floor toward a table on the covering floor, she caught her toe on the plank, and, falling, received the injuries for which she seeks to recover in this action.

The case is a close one, but we are brought to the conclusion that there was no evidence of negligence on the part of the defendant. The physical situation we have described constituted no trap. It is not negligence in and of itself to make changes

in a retail store or to carry on business while they are in progress. The duty resting on the employer under such circumstances is to give adequate information to those employed, so that they may fully appreciate existing peril and the consequences likely to ensue from it. The plaintiff was an intelligent woman of mature years, and saw and knew about the plank, and was left to do the work in her own way. The danger was open and plain and temporary in character. The greatest care, which the defendant could have been asked to exercise, was to warn her that the plank was there, and that she must be careful to step over it so as not to stumble. But such a statement could have conveyed to the plaintiff no knowledge, which she did not already have. The failure to give instructions where none are necessary is not negligence. There was no such probability that a saleswoman, in the possession of her faculties and aware of the presence and position of a plank lying nearly flat on the floor, would fail to step over it as to make it incumbent upon the defendant to take any measures to prevent injury. There was no fact or circumstance naturally calculated to excite apprehension in the minds of the agents of the defendant as reasonably prudent men that the plaintiff would suffer harm. *Meehan v. Holyoke Street Railway*, 186 Mass. 511. *Regan v. Lombard*, 192 Mass. 319. *Pembroke v. Cambridge Electric Light Co.* 197 Mass. 477. *Duffy v. New York, New Haven, & Hartford Railroad*, 192 Mass. 28. *Lanoue v. Nelson*, 202 Mass. 554.

Exceptions overruled.

MARY A. WILLIAMS vs. JAMES R. CARTY.

Middlesex. January 24, 1910. — March 23, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Equity Jurisdiction, Specific performance. Statute of Frauds. Fraud. Estoppel.

A bill in equity, which sought to enforce specific performance of an oral contract by which the defendant agreed to convey and the plaintiff, a woman, agreed to purchase a farm called the "H. place," alleged that included in the "H. place" was a valuable orchard called the "T. lot," that the defendant dissuaded the plaintiff from having the title examined before delivery of the deed and by false and fraudulent representations executed and delivered and induced the plaintiff to accept a deed which omitted from its description the "T. lot," that for the deed the plaintiff paid some cash and gave a note secured by a mortgage, supposing that the deed included in its description the whole of the "H. place," that the plaintiff took possession under the deed believing "that she had taken possession of the whole of" the "H. place," that she moved her household furniture and belongings from another town to the buildings upon the "H. place," and in further reliance upon the representations of the defendant gave up a comfortable home and a profitable employment and business, that after taking possession she had made valuable improvements upon the place, and that thirteen days after taking possession she discovered that the "T. lot" was not included in the defendant's deed. It was not distinctly averred that the improvements were made by the plaintiff before she discovered the defendant's fraud. The defendant demurred on the ground that the bill sought the enforcement of a contract for the sale of lands without the memorandum required by R. L. c. 74, § 1, cl. 4. *Held*, that since the plaintiff when she took possession thought she was taking possession of the whole "H. place," according to the agreement of the parties which the defendant by his own fraud failed to express in the deed, the defendant might be presumed to have given up, and the plaintiff to have taken, possession of the whole "H. place," that the removal by the plaintiff to the place newly purchased must have been contemplated by the defendant, and that the giving up of her business by the plaintiff might have been found to have been induced by the act of the defendant, and therefore that the case was distinguishable from *Glass v. Hulbert*, 102 Mass. 24, there having been a part performance and a change of situation on the part of the plaintiff which estopped the defendant from setting up the statute of frauds, and that the defendant's demurrer should be overruled.

Where an oral agreement for the sale of land, which originally was unenforceable by the purchaser by reason of R. L. c. 74, § 1, cl. 4, has been partly performed by the purchaser by paying the purchase price, by taking possession of the land, and by suffering substantial loss either through a change in his situation or the making of improvements upon the estate, and where the purchaser cannot be restored to his original situation, he may maintain a suit in equity for specific performance of the contract.

RUGG, J. This is a suit in equity, by which the plaintiff seeks to enforce specific performance of a contract for the sale

of land. The bill alleges an oral agreement on the part of the defendant to convey and of the plaintiff to purchase a certain farm called the "old Ephraim Hatch place," (with the exception of about two acres not now material,) an integral part of which was a valuable orchard called the "Taylor lot" containing about seventeen acres, and dissuasion on the part of the defendant from having the title of the property described in the deed searched by the plaintiff before delivery thereof; that the defendant in fact caused to be executed and delivered to the plaintiff, by false and fraudulent representations, a deed which omitted from its description the Taylor lot, for which she paid the consideration by a small cash payment and a large mortgage to the defendant, supposing that the deed conveyed the entire farm including the Taylor lot; that the plaintiff took possession under the deed believing "that she had taken possession of the whole of the said Hatch farm"; and that she moved her household furniture and belongings from another town to the buildings upon the farm, and that in further reliance upon the representations of the defendant she with her husband gave up a comfortable home, and profitable employment and business, which constituted a valuable means of livelihood; that since taking possession of the farm she has made valuable improvements by way of ditching, fencing, fertilizing, clearing, cultivating and otherwise, for which no adequate compensation can be made; that thirteen days after taking possession she learned that the deed did not convey the Taylor lot. It is not distinctly alleged whether any of these improvements were made before the discovery of the defendant's fraud in making the deed. The defendant demurred on the ground that the bill asks the enforcement of a contract for the sale of lands without the memorandum required by the statute of frauds. In the Superior Court * a decree was entered dismissing the bill. The plaintiff's appeal brings the case here.

The defendant strenuously contends that under the authority of *Glass v. Hulbert*, 102 Mass. 24, the decree was rightly entered. The principle there laid down was that the conveyance of land cannot be decreed in equity by reason merely of an oral agree-

* After a hearing on the demurrer before *Dana, J.*

ment therefor against a party denying the alleged agreement and relying upon the statute of frauds in the absence of evidence of change of situation or part performance creating an estoppel against the plea of the statute of frauds. It may be noted that there is a difference between the initial fraud alleged in the present bill and that in *Glass v. Hulbert*. In the latter case the deed expressed the agreement of the parties, but the agreement was induced by fraud. In the present case it is alleged that the deed failed to express the real agreement of the parties by reason of the fraud and imposition practised by the defendant upon the plaintiff. For this reason what is said in that opinion, briefly and without elaboration (102 Mass. at page 28), to the effect that possession by the purchaser under such a deed is according to title thereby conveyed, has no application to the present facts. The entry for the purpose of possession in that case was thought to be no more extensive in its operation than the description contained in the deed, because the description in the deed corresponded with the agreement, the alleged fraud touching the agreement and not the deed. In the present suit the fraud alleged relates only to the deed. The agreement is alleged to have been for the sale of a unit of real estate, namely, the Hatch farm, of which the omitted lot was but a fraction. Hence the allegation of the bill, in substance, that the plaintiff took possession by intent of the entire farm, means that she took possession of that which had been described to her in the oral agreement as a farm including the lot omitted from the deed, and that the entry made and possession taken were as wide as the oral contract and made in reliance upon the misrepresentation of the defendant that the deed was in accordance with it. It was not necessary for her to go upon every foot or acre of the farm in order to take valid possession of the whole of it. The moving of her household into the buildings and making such use of the estate as indicated proprietorship of it was sufficient. The defendant by turning over the possession to the plaintiff under a deed, which, by his own fraud, failed to express the agreement of the parties, may be presumed to have given up possession of the whole under the oral contract. It may therefore be assumed upon the allegations of the bill that the plaintiff took such possession as was reasonable in view of all the circumstances of the entire

farm including the lot in question in reliance upon the misrepresentation.

The removal of the home of the plaintiff to the farm in reliance upon the terms of the contract must also have been contemplated by the defendant. This was not a collateral undertaking, but a primary purpose of the purchase by the plaintiff. A necessary result of assuming a new home was the abandonment of the old. The reasonable consequences of such a change of domicile might so affect the condition of the plaintiff that it would be inequitable to deprive her of the advantages she would gain by having the contract specifically performed. It is not necessary in a case of this sort that the loss to the plaintiff shall be a corresponding gain to the defendant.

It is alleged that the plaintiff abandoned a profitable business in another town, in reliance upon the oral contract, for the purpose and at the time of the taking possession of the land contracted for. Although it is not alleged that this was known to the defendant, it was or may be found to be an act "growing out of" the "contract with the defendant to which it could be exclusively referrible" and to have been induced by the act of the defendant. *Graves v. Goldthwait*, 153 Mass. 268, 270. While this circumstance standing alone would not constitute a part performance, yet where there is payment in full and a taking possession, both of which are technical part performance, then such attendant conditions may be considered for the purpose of ascertaining whether the parties can be restored to their original position, and whether money damages will be adequate compensation to the one injured.

It is probable that in the brief time elapsing between the taking possession and the discovery by the plaintiff of the defendant's fraud no extensive improvements could have been made upon the farm, but her situation was peculiar after this discovery. She was rightfully in possession. We are not inclined to hold her strictly to the management of the farm at her peril. If it was reasonable husbandry to go forward and make the improvements, her position may have been such as to justify her in doing so.

The result we reach is not in conflict with the principles laid down in *Glass v. Hulbert*, 102 Mass. 24, and is within the rule

there stated and often applied that where an oral agreement respecting land, originally unenforceable by reason of the statute of frauds, has been partly performed by the party seeking to enforce it by paying the purchase price, by taking possession and by suffering substantial loss either through changed situation or the making of improvements upon the estate, and where he cannot be restored to his original situation, specific performance may be granted. *Potter v. Jacobs*, 111 Mass. 32, 37. *Low v. Low*, 173 Mass. 580. *Harrell v. Sonnabend*, 191 Mass. 310. *Sarkisian v. Teele*, 201 Mass. 596, 608.

Decree reversed.

J. J. Higgins, (A. A. Schaefer with him,) for the plaintiff.

P. Keyes, for the defendant.

COMMONWEALTH vs. JAMES C. GOLDMAN.

Suffolk. February 21, 1910. — March 23, 1910.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Automobile. Evasion of Carriage Hire. Words, "Carriage."

Under R. L. c. 208, § 55, which provides that "whoever . . . with intent to cheat or defraud the owner thereof . . . refuses to pay for the use of a horse or carriage the lawful hack or carriage fare established therefor by any city or town, shall be punished" as therein provided, a complaint cannot be maintained for refusing to pay the lawful fare for the use of an automobile.

KNOWLTON, C. J. The R. L. c. 208, § 55, is in part as follows: "Whoever . . . with intent to cheat or defraud the owner thereof, . . . refuses to pay for the use of a horse or carriage the lawful hack or carriage fare established therefor by any city or town, shall be punished by a fine of not more than twenty dollars or by imprisonment for not more than two months, or by both such fine and imprisonment."

The defendant was found guilty upon a complaint made under this statute. The complaint does not refer to a horse or to a carriage by name, but alleges that the defendant "did use a certain automobile" and did "refuse to pay for the said use of said automobile, the said lawful fare established therefor as

aforesaid." The only question in the case is whether the word "carriage" used in the statute includes automobiles.

The same question was very fully considered in *Doherty v. Ayer*, 197 Mass. 241, in reference to the word "carriages" as used in R. L. c. 51, § 1. Much of what was said in that case is equally applicable to the question now before us.

For the Commonwealth, it may be said that the reasons for such a statute are the same in reference to refusal to pay for the use of an automobile, with intent to cheat or defraud the owner, as in reference to a like refusal when a carriage is used. On the other hand, the defendant well contends that this is a criminal statute and that such statutes are always construed strictly in favor of the defendant.

It is certain that when this statute was originally enacted, the Legislature, in using the word "carriage," had no thought of a vehicle made up in large part of complicated machinery, and propelled by a powerful engine whose operation is similar to that of locomotive engines on railroads. While such a vehicle may be called a carriage in the broad sense that it is used to carry persons and property, it is not commonly referred to as a carriage, but is distinguished from carriages by another name to designate a vehicle of an entirely different character.

We are of opinion that automobiles are not included in this statute.

Exceptions sustained.

The case was submitted on briefs.

W. Hirsh, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth.

CATHERINE MINIHAN vs. BOSTON ELEVATED RAILWAY
COMPANY.

Suffolk. March 2, 1910. — March 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Witness, Cross-examination. Evidence, Opinion: experts, Relevancy and materiality, Of attempt to intimidate witness. Practice, Civil, Conduct of trial, Exceptions.

A witness, who testified as a medical expert for the defendant at the trial of an action for personal injuries, stated that he had examined the plaintiff in the presence of her own physician and that the plaintiff's physician had taken from his pocket and read to the witness portions of a letter from another physician, a throat and nose specialist, who had examined the plaintiff's nose, and that the witness had taken notes of what the plaintiff's physician read. On cross-examination the witness stated again that he "took down what" the plaintiff's physician read to him. Subject to an exception by the defendant he then was asked, "Well, you said 'swelling.' If . . . [the plaintiff's physician] . . . read a 'marked swelling,' you didn't get that?" and answered "I have no recollection." *Held*, that the exception must be overruled, because the plaintiff had a right to cross-examine the witness as to the grounds of his opinion, and that whatever was said at his examination of the plaintiff was competent, even if the inquiry extended to trivial details.

Evidence of an attempt to intimidate an adverse witness in order to dissuade him from testifying is inadmissible in the absence of evidence tending to show some connection of the party, against whom the witness was to testify, with the acts of intimidation.

An exception to a refusal by the judge presiding at a trial to give a certain ruling will not be sustained, even if the ruling states correctly a pertinent proposition of law, if the judge includes the ruling refused in another ruling which he gives at the request of the same party, and also in his charge states to the jury substantially the proposition of law stated in the ruling which he refused.

If the judge presiding at a trial in his charge to the jury makes an erroneous statement with regard to a certain portion of the evidence, and, upon his attention being called to the fact, announces that he changes his instructions and corrects the error, an exception to the erroneous statement thus afterward corrected must be overruled.

In the absence of any statement to the contrary in a bill of exceptions, it is to be presumed that a colloquy, therein narrated, between the judge presiding at a trial before a jury and the counsel for one of the parties, which occurred immediately following the charge and referred to certain statements in the charge which in the course of the colloquy the judge corrected, was in the jury's presence and according to the usual course of jury trials.

TORT for personal injuries which were received on the evening of August 31, 1904, when the plaintiff was a passenger on a short four wheeled box car of the defendant on Dorchester

Street in that part of Boston called South Boston, and were due to the car's running off the track and down an embankment. Writ dated October 20, 1904.

The case previously was before this court upon exceptions of the defendant after a verdict for the plaintiff, and is reported in 197 Mass. 367. It was tried a second time before *Sherman, J.*

That part of the bill of exceptions which relates to the testimony of the defendant's medical expert, Dr. Howard A. Lothrop, referred to in the opinion, stated that the witness "testified among other things on direct examination that at an examination made by him of the plaintiff within three or four weeks after the accident, in the presence of Dr. Devine, the plaintiff's attending physician, and one of her witnesses at the trial, Dr. Devine had taken from his pocket a paper which he stated was a letter that he had received from Dr. Timothy J. Reardon, a throat and nose expert, who had examined the plaintiff's nose, and that Dr. Devine stated that he would read to the witness Lothrop a portion of said letter, and that he then did read what purported to be a portion of said letter, but that Lothrop did not see the letter, and that he (Lothrop) took notes of what Dr. Devine read. On the cross-examination of Dr. Lothrop, the plaintiff's counsel held in his hand a written paper in the form of a letter, and the following questions were asked and answers given: Q. Well, you did take down, at all events, what he wrote to Dr. Devine? A. I took down what Dr. Devine read to me. — Q. Well, you said 'swelling.' If Dr. Devine read a 'marked swelling,' you did n't get that? (Objected to by counsel for the defendant. The plaintiff's counsel stated: 'I am testing the witness's recollection.') A. I have no recollection. (The defendant excepted.) — Q. You are not sure you took down everything Dr. Devine read? A. I took down the gist of what he read to the best of my ability. — Q. Will you swear he did not say 'marked swelling'? A. I won't swear one way or the other. I am telling you the truth as well as I can. — Q. You wouldn't say that he didn't say 'marked swelling'? A. I can't say anything different from what I have said."

The defendant offered the testimony of one Delia Lynch, who at the time of the accident and until some time after the first trial of this case had been a neighbor of the plaintiff, and who

testified at both trials to some of the plaintiff's actions after the accident. The defendant in opening the case had stated in reference to the witness Delia Lynch that it would offer evidence tending to show that after the first trial she had been subjected by the plaintiff and by members of the plaintiff's family, with the knowledge and consent of the plaintiff, to certain indignities and threats amounting to intimidation, and had interrogated Delia Lynch and other witnesses with a view to connecting the plaintiff herself with the alleged intimidation of Delia Lynch, but had failed to show such connection. On the direct examination of Delia Lynch she was asked: "Can you connect her in any way—is there any way—did you, in consequence of these events, her following you on the street and other events which took place in connection with her family, did you come to me and make a complaint?" and "Did you, in consequence of anything that was said, go to an attorney?" Both questions were excluded subject to exceptions by the defendant.

The eighth, twentieth and twenty-seventh rulings asked for by the defendant and referred to in the opinion were as follows:

"8. The plaintiff is not entitled in this case to the benefit of the rule of *res ipsa loquitur*."

"20. If the jury believe the defendant's explanation of this accident, namely, that it was due to a combination of the ordinary tilting of the car in such a position as it was when it was derailed, such tilting, however, not being sufficient in itself to cause the derailment, with the presence on the track of some obstruction or thing which was of such a size and character, and which got there at a time and under such circumstances that its presence could not have been foreseen, prevented or detected, or its consequence avoided by the exercise of that high degree of care which the law required of the defendant, its servants or agents, including the motorman and conductor, then the jury should not hesitate in finding a verdict for the defendant."

"27. If the jury believes the explanation of this accident offered by the defendant, that is to say, that the derailment of this car was caused by the presence of some small obstruction on the track in combination with an oscillation not in itself dangerous, and that said small object got there after the passage of the car next previous to the car in which the plaintiff was riding, and

could not be perceived by the motorman by the exercise of that high degree of care which he was under an obligation to use, and that after the car struck said obstruction the motorman did all he could to obviate the consequences of the accident, then the plaintiff cannot recover."

Other facts are stated in the opinion. There was a verdict for the plaintiff; and the defendant alleged exceptions.

W. G. Thompson, (S. H. E. Freund with him,) for the defendant.

J. E. Cotter, (J. F. Creed with him,) for the plaintiff.

BRALEY, J. The exceptions are to the admission and exclusion of evidence, to the refusals to rule as requested and to a part of the instructions.

The plaintiff clearly had the right to cross-examine the defendant's medical expert as to the grounds of his opinion, including what took place at the examination as to her physical condition, which he conducted in the presence of her physician, and whatever was said or done at the interview was competent even if the inquiry extended to trivial details. Nor does it appear that the method or manner of cross-examination exceeded the discretionary power of the court. *Jennings v. Rooney*, 188 Mass. 577, 579.

If the plaintiff attempted to intimidate adverse witnesses, proof of her conduct was relevant, as being in the nature of an admission that her claim was largely groundless, but the defendant, either before or after asking the question excluded, failed to show her connection with the alleged acts of intimidation. Until this essential foundation had been laid, these questions were rightly ruled to be inadmissible.

The plaintiff's due care not having been contested, proof of the derailment of the car in which she was riding as a passenger established *prima facie* the defendant's negligence, until some satisfactory explanation was offered. *Minihan v. Boston Elevated Railway*, 197 Mass. 367. *Carroll v. Boston Elevated Railway*, 200 Mass. 527. After introducing evidence that it was without fault, because the accident happened from causes which it could not reasonably have anticipated, the defendant presented thirty-two requests for rulings, but only the refusal to give the twentieth request has been argued, while the other requests so far as

they were not given have been waived. It is evident, that this request not only was substantially covered by the instructions, but having been embodied in the twenty-seventh request which was given as framed, the defendant fails to show any prejudicial error. *Graham v. Middleby*, 185 Mass. 349. While the eighth request was given, it furthermore appears, that the jury were correctly instructed, that unless upon all the evidence, including the fact of the derailment, with the burden of proof upon the plaintiff, they were satisfied of the defendant's negligence she could not recover. *Carroll v. Boston Elevated Railway*, *ubi supra*.

If in the charge the judge inadvertently or erroneously stated that the testimony of the defendant's witnesses was only in partial explanation of the derailment, upon his attention being called to the limitation, he then announced that he changed the instructions, and properly left to the jury the question, whether the explanation as the defendant contended was complete and sufficient. We are not impressed by the argument of defendant's counsel, that the jury neither heard nor understood the modification, to which no exception was taken. The judge at the close of his instructions said, "Now, gentlemen, that is about all the aid I can give you on this question, and we will leave it there, unless the counsel on one side or the other think I have said something I ought not to, or left unsaid something that I ought to have said." It is to be presumed, as the exceptions contain nothing to the contrary, that the colloquy which immediately followed was in the jury's presence and according to the usual course of jury trials. If the defendant was apprehensive that they might not have fully understood the instructions as finally left, it should have asked the judge to have directed their attention more specifically to what there had been said on this point. But not having done so, we assume that in the opinion of experienced counsel there was no reasonable ground for such a request.

The rulings throughout the trial were sufficiently favorable to the defendant, and the exceptions must be overruled.

So ordered.

GAETANO DE VINGO & others vs. ANNIE A. HALL.

Suffolk. March 2, 1910. — March 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Mechanic's Lien.

Where three persons, each of whom has a lien under R. L. c. 197, § 1, upon certain real estate for labor performed in the erection of a building thereon, file in the registry of deeds for the county where the real estate is situated within the time allowed by § 6 of that chapter a certificate containing a description of the real estate upon which the liens are claimed, the opening statement of which is "We hereby certify that the following is a just and true account, with all just credits given of the amount due us for labor performed in the erection of a building" upon the lot described, followed under the word "Account" by three separate statements of the labor performed by each of the lienors, which certificate is signed and sworn to by an attorney in behalf of all of the lienors, the liens are preserved and the three lienors may maintain a joint petition to enforce them under § 11 of the same chapter.

The inversion, in the caption of the statement of account included in the certificate filed by a lienor under R. L. c. 197, § 6, to preserve a mechanic's lien, of the names of the lienor and of the contractor, which is an obvious error in the manner of stating the account, does not affect the validity of the lien.

PETITION, filed on June 26, 1907, under R. L. c. 197, § 11, by Gaetano De Vingo, Francesco Tateo and Ettore Di Giacomo, each of whom claimed a lien upon certain real estate of the respondent for work and labor performed in the erection of a building thereon.

Issues were framed for a jury and were tried before *Hitchcock, J.* The certificate filed by the petitioners in the registry of deeds for Suffolk County and referred to in the opinion was as follows:

"We hereby certify that the following is a just and true account, with all just credits given of the amount due us for labor performed in the erection of a building situated on a lot of land . . . [which was described in detail] . . . said lot of land being owned, to the best of my knowledge and belief, by Annie A. Hall of Boston, Mass.

" ACCOUNT

" Account of Gaetano De Vingo

Gaetano Di Vingo

to

Giovanni Di Salvi, Dr.

"To work and labor performed 15 days labor from January 31,
1907 to May 30, 1907, at \$4.00 per day \$60.00

“ Account of Francesco Tateo
Francesco Tateo

to

Giovanni Di Salvi, Dr.

“ To work and labor performed 15 days labor from January 31,
1907 to May 28, 1907 at \$4.00 per day \$60.00

“ Account of Ettore Di Giacomo
Ettore Di Giacomo

to

Giovanni Di Salvi, Dr.

“ To work and labor performed 8 days from April 22, 1907 to
May 30, 1907 at \$2.00 per day \$16.00

We further certify that we ceased to perform labor on said building on the thirtieth day of May 1907 and we hereby claim a lien upon said building, and upon the interest of the owner thereof in the lot of land upon which the same is situated to secure the payment of the debt due us as aforesaid, and of the costs which may arise in enforcing said lien. Francesco Tateo, Gaetano Di Vingo, Ettore Di Giacomo by their attorney Charles E. Leonardi.”

The certificate was sworn to by Charles E. Leonardi “on behalf of the above named persons.”

At the trial, the certificate was admitted in evidence subject to an exception by the respondent. At the close of the evidence the respondent asked the presiding judge to rule as follows:

“1. That the petitioners did not file in the registry of deeds a certificate within the meaning of R. L. c. 197, § 6, and that for this reason they have no lien upon the premises of the respondent and that the verdict should be for the respondent.

“2. That the statute provides that each claimant must file an individual certificate to maintain his lien, and as the petitioners joined in a joint certificate they did not comply with the provisions of the statute and are not entitled to a verdict.”

The judge refused to rule as requested, and the issues were determined in favor of the petitioners. Thereupon the judge found for the petitioners; and the respondent alleged exceptions.

J. F. Cronin, for the respondent.

C. E. Leonardi, for the petitioners.

MORTON, J. This is a petition to enforce mechanics' liens for labor performed in the erection of a building on land belonging to the respondent. The several petitioners have joined in one petition. The case is here on the respondent's exceptions to the refusal of the judge to give certain rulings requested and to the finding in favor of the petitioners.

The petitioners not only joined in one petition to enforce their liens, but they united in one statement or certificate of lien, and it is that which the respondent contends invalidates the proceedings. The statute provides that "The lien shall be dissolved unless the person claiming it, within thirty days after he ceased to labor on . . . the building or structure, files in the registry of deeds for the county or district in which it is situated a statement, signed and sworn to by him or a person in his behalf, giving a just and true account of the amount due him, with all just credits, a description of the property intended to be covered by the lien sufficiently accurate for identification and the name of the owner or owners of such property, if known." R. L. c. 197, § 6. The statement of lien was signed and sworn to on behalf of each petitioner and was duly filed in the registry of deeds within thirty days after each had ceased to labor on the building. It contained a statement of the amount due each, with the number of days of labor and the inclusive dates between which the labor was performed, and the rate of wages. No one looking at the certificate could fail to understand from it that each of the parties claimed a lien on the premises described, for the labor performed by him, or could fail to see that there was a statement by each in the form of an account of the amount due him. The certificate was in effect three statements together instead of being one statement by three. The statute does not provide, it is true, as in the case of petitions, that several may join in one certificate, but it is not forbidden; and, so long as there is a statement by each containing the particulars required by the statute, we see no objection to its being done. The respondent does not contend that she was in any way misled, or that the accounts are not just and true accounts, or that the property, with herself as owner, is not correctly described. The inversion in the accounts of the names of the petitioners and of the contractor as debtor and creditor was an obvious error in the

manner of stating the account, and did not invalidate the liens. R. L. c. 197, § 7. The matter is one of statutory construction, and from the nature of the case decisions from other States can be of little or no assistance, and for that reason we have not thought it necessary to refer to them. We think that the rulings requested were rightly refused, and that the exceptions should be overruled.

Exceptions overruled.

ALMORE H. HATCH vs. BOSTON AND NORTHERN STREET
RAILWAY COMPANY.

Norfolk. March 4, 1910. — March 23, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & RUGG, JJ.

Negligence, Street railway, Due care of plaintiff.

At the trial of an action against a street railway company for injuries caused by a collision between an electric street car of the defendant and a top buggy in which the plaintiff was driving, there was evidence tending to show that the collision occurred at about 9.30 P. M. on a July 31 upon a city street fifty or sixty feet wide running northerly and southerly with double street railway tracks in the middle, that just previous to the collision the plaintiff, driving in a southerly direction with the flap at the back of the buggy up so that he had an unobstructed view of the street and tracks behind him, stopped at the curbing on the westerly side of the street to allow a guest to alight, that thereafter he looked behind him and saw a car approaching at a distance of three or four hundred feet, struck the horse with a rein, turned his buggy toward the east and was crossing the street in a semicircle turning toward the south, when the car struck the buggy between the front and rear wheels, breaking the whiffletree and both front wheels, dishing the rear wheels, breaking the box and the top of the buggy and pushing the buggy along ten or twelve feet before the car came to a stop. The plaintiff testified that he did not remember whether he heard a bell or gong before the car struck the buggy, that he was familiar with the locality and knew that cars ran there every three or four, and sometimes every five or ten minutes, and that he could easily have seen up the track as he was crossing it. There was no evidence as to whether the gong of the car was sounded. There was evidence tending to show that the car at the time of the collision and immediately before was going very rapidly. *Held*, that it could not be said as matter of law that the plaintiff was not in the exercise of due care, or that the motorman was not negligent, and that the case was for the jury.

TORT for personal injuries and damage to the plaintiff's horse and buggy incurred in a collision upon Broadway in Chelsea

between an electric street car of the defendant and the plaintiff's buggy, which was alleged to have been caused by negligence of the defendant's motorman. Writ dated September 5, 1907.

The case was tried before *Bishop, J.* The facts are stated in the opinion. At the close of the plaintiff's evidence the defendant asked for a ruling that a verdict in its favor be ordered. The presiding judge refused to rule as requested and, the defendant having rested, after argument by counsel and a charge by the judge, the case was submitted to the jury at one o'clock in the afternoon. At two o'clock, having ascertained that the jury had failed to agree, the presiding judge recalled them and ordered a verdict for the defendant; and the plaintiff alleged exceptions, which, after the death of *Bishop, J.*, were allowed by *Pierce, J.*

E. M. Schwarzenberg, for the plaintiff.

G. Hoague, for the defendant.

MORTON, J. The defendant does not contend that there was no evidence warranting a finding that the car which struck and injured the plaintiff was not operated by it. Its contentions are that the plaintiff was not in the exercise of due care, and that the motorman was not negligent.

The street was fifty or sixty feet wide, running northerly and southerly, and with double tracks in the middle. The plaintiff had drawn up to the curbing on the westerly side in order to allow his sister to alight. The flap in the back part of the buggy was rolled up and the plaintiff had an unobstructed view from the back of the buggy. After his sister had alighted he looked through the back of the buggy and saw a car upon the bridge about three or four hundred feet southerly from where he was. He hit the horse with the rein and immediately started to cross the tracks in a semicircular and southerly direction, so as to get on to the other side of the street. The horse was over the further track, with his hind feet possibly on the track, when the car struck the buggy, throwing the plaintiff out and causing the injuries complained of. The plaintiff testified that he did not look again after looking through the back of the buggy as he turned to cross the tracks. The accident happened about half past nine o'clock in the evening, on July 31, 1907.

The plaintiff would not say whether he heard a bell or gong

before the car struck the buggy; he did not remember. He was familiar with the locality and knew that cars ran sometimes every three or four minutes, and sometimes with an interval of five or ten minutes between, and he looked before he started to turn around because he appreciated that he might be hit by a car. When he crossed the first or westerly track his horse was pointing in a diagonal direction, partly towards the easterly curbing and partly towards the bridge, and he could very easily have seen up the track if he had wanted to and there was nothing to obstruct his view. There was testimony tending to show that the car was going very rapidly; and the plaintiff testified that it struck the buggy between the front and rear wheels, breaking the whiffletree and both front wheels, dishing the rear wheels, breaking the box and top of the buggy, and pushing the buggy along ten or twelve feet before it came to a stop.

On this evidence we think that the questions of the plaintiff's due care and the motorman's negligence were for the jury. The distance which the plaintiff had to go before he crossed the tracks was only thirty or forty feet, and it was for the jury to say whether he might not properly assume that he would have time to get across safely before the car would come along. It cannot be said as matter of law that with the car three or four hundred feet away he should have stopped and waited for it to go by, or that, though he could easily have seen the car if he had looked, he was not warranted in relying upon the look that he had given and the judgments that he had formed before he started to cross. *Fallon v. Boston Elevated Railway*, 201 Mass. 179. *Jeddrey v. Boston & Northern Street Railway*, 198 Mass. 232. *Le Baron v. Old Colony Street Railway*, 197 Mass. 289. *Wood v. Boston Elevated Railway*, 188 Mass. 161.

As to the motorman there was testimony tending to show, as already observed, that the car was going very rapidly. This was corroborated by the details as to the damage done to the buggy and the distance which the buggy was pushed along before the car came to a stop. If it is true that there was no evidence that the gong was not sounded, it is equally true that there was no evidence that it was. The motorman had an unobstructed view of the track for several hundred feet, and, though it was

half past nine o'clock in the evening, it was in July, and there seems to have been no difficulty in distinguishing objects at a reasonable distance. The street was a much used public way, as stated in the defendant's brief, and if the motorman could not see clearly it was or could be found to be negligence on his part for him to send the car along very rapidly; and if he could see clearly there was, so far as appeared, no satisfactory explanation of the accident except that it was due to negligence on his part.

We think that the trial judge erred in directing a verdict for the defendant. The fact that he had submitted the case to the jury and that they had deliberated upon it for an hour or more without arriving at a verdict would not have operated to prevent him from recalling them and directing them to return a verdict for the defendant if the case had warranted it. *Byrne v. Boston Elevated Railway*, 198 Mass. 444.

Exceptions sustained.

HANNAH W. HUSSEY vs. JOHN J. FRANEY.

Suffolk. March 7, 1910. — March 23, 1910.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & RUGG, JJ.

Agency, Existence of relation. Master and Servant. Funeral.

Where a stable keeper lets for an afternoon a hack with a pair of horses and the driver to another stable keeper, who sends the hack with its driver to a funeral in charge of an undertaker, who sits on the front seat of the hearse at the head of the funeral procession and directs its course and speed, the hack driver remains the servant of the first stable keeper who pays him and who sent him out for the afternoon, and, if a person attempting in the exercise of due care to cross the path of the funeral with a horse and buggy is injured by reason of the negligence of the hack driver, such employer is liable in damages.

Whether a person sitting as a guest in a buggy by the side of one driving across a funeral procession in such a way as wilfully to interrupt and disturb it in violation of R. L. c. 212, § 84, could recover from the employer of the driver of one of the carriages in the procession for injuries caused by the negligence of such driver, here was not considered, because there was no evidence of a violation of the statute.

TORT for personal injuries sustained by the plaintiff on November 8, 1908, by reason of the negligence of one Duggan, who

was driving in a funeral procession a pair of horses attached to a hack belonging to the defendant, a stable keeper, and ran into a buggy belonging to one Bakeman, in which Bakeman was driving with the plaintiff as his guest, the funeral procession being in charge of one Hogue, an undertaker. Writ dated February 1, 1904.

In the Superior Court the case was tried before *Lawton, J.*, without a jury. The defendant asked for seventeen rulings, which were refused by the judge, and which are described by him in his decision printed below, in which the facts relied upon by the defendant also are stated. The first of these rulings requested was that "upon all the evidence and the pleadings, the plaintiff is not entitled to recover," and the eighth was that "upon the evidence in this case, Duggan, the hack driver, was not the servant of the defendant at the time of the accident."

The judge made the following memorandum of decision :

"I am satisfied that Bakeman, the driver of the carriage in which the plaintiff was riding, was in the exercise of due care, and that Duggan, the driver of the hack, was negligent. At the time when Bakeman turned to drive through the funeral procession, it should have been evident to Duggan that Bakeman intended to attempt to drive through, and he testified that it was evident to him. At the time when Bakeman turned to drive through, the distance between his buggy and Duggan's hack, the rate at which the buggy and the hack respectively were going (a slow trot in both cases) and the distance between Duggan's hack and the hack next in front were such that Bakeman was well warranted in proceeding. By the exercise of reasonable care on Duggan's part, by slowing his horses a little or by turning them a little to the left, or by both, the collision would have been avoided. This was so clearly the natural thing for him to do under the circumstances, that his doing the contrary (as he did) is very strong evidence that he was trying to drive in front of Bakeman to head him off and prevent his going through the procession. Bakeman had a right to assume that Duggan would exercise due care until the contrary appeared. When the contrary appeared, there was not time enough for Bakeman by the exercise of reasonable care to extricate himself and avoid the collision.

"The defendant, a stable keeper, denies his liability for the injury because of the following facts: The hack which caused the injury was owned by him, and the driver, Duggan, was in his employ. For the afternoon in question he had let the hack and driver to one Conklin, also a stable keeper, he himself knew nothing of what the hack was to be used for, or where it was to go, or where it did go, until it returned to his stable at night. The undertaker who had charge of the funeral rode on the hearse at the head of the funeral procession, and directed its course and speed. Whether Conklin had let the hack to the undertaker or to the persons who rode in it did not appear.

"The case seems clearly within the rule laid down in *Driscoll v. Towle*, 181 Mass. 416. The defendant in his requests for rulings numbered 8 to 14, inclusive, apparently asks me to rule the contrary, and those requests were refused. The remainder of the defendant's seventeen requests are, in view of foregoing findings and rulings, immaterial, or improper, and are all refused and to these rulings and refusals to rule, the defendant seasonably saved his exceptions."

The judge found for the plaintiff, and assessed damages in the sum of \$2,000. The defendant alleged exceptions.

The case was submitted on briefs.

M. O. Garner, for the defendant.

A. T. Johnson, for the plaintiff.

MORTON, J. The principal question in this case is whether Duggan, the driver of the hack, was at the time of the accident the servant of the defendant, or of Conklin, to whom the defendant had let the hack with the horses and driver, or of Hogue, the director of the funeral procession of which the hack formed a part.

There was nothing to show, or at least it cannot be said that it could not have been found, that the hack with the driver and horses was not let in the usual manner, with the implied understanding that the driver remained the servant of the defendant, and as such had the management of the horses and exercised care and oversight over them and the hack, but was to obey such directions as to the use to be made of the hack as might be given to him by the person to whom the hack, driver and horses were let. Under such circumstances it is clear that the defend-

ant would be liable for injuries suffered by a third person in consequence of the driver's negligence. *Shepard v. Jacobs*, 204 Mass. 110, and cases cited. *Driscoll v. Towle*, 181 Mass. 416. *Randolph v. O'Riordon*, 155 Mass. 381. *Standard Oil Co. v. Anderson*, 212 U. S. 215. *Dewar v. Tasker & Sons*, 23 T. L. R. 259, 260.

There is no just ground for the contention that the driver was the servant of either Conklin or Hogue. Conklin simply sent the hack and driver to Hogue, and Hogue, beyond riding on the hearse with the driver and thus setting the pace for the procession and beyond indicating to Duggan his place in the procession, exercised no control whatever over him.

It is plain that there was evidence of negligence on the part of Duggan. No contention is made that the plaintiff was not in the exercise of due care.

There was no evidence to warrant a finding that Bakeman wilfully interrupted or otherwise disturbed the funeral procession in violation of R. L. c. 212, § 34, even if we assume in the defendant's favor without deciding that, if he had done so, it would have operated to prevent the plaintiff from recovering.

Exceptions overruled.

CATHERINE DEVINE, administratrix, vs. NEW YORK, NEW
HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. March 8, 9, 1910. — March 23, 1910.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & RUGG, JJ.

Negligence, Gross. Railroad.

In an action by an administratrix against a railroad corporation under R. L. c. 111, § 287, for causing the death of the plaintiff's intestate by reason of the alleged gross negligence of the defendant's servants, it appeared that the plaintiff's intestate was in the employ of the city in which the accident occurred, and for about three months had been at work with others under the charge of an assistant superintendent of the water works of the city in laying a water pipe across the location of tracks on which trains were operated by the defendant, at a place not far from a large terminal station and near a yard for passenger coaches and a coaling station for locomotives, that it was a very noisy place and there were many tracks there, that trains and locomotives constantly were passing and re-passing, both backing and going forward, and that from the place where the

accident occurred trains coming from the terminal station were visible for about two hundred feet. There was evidence tending to show that when a locomotive was coming from the direction of the station with its tender forward, it was impossible from the cab to see the track where the plaintiff's intestate was, that the workmen of the city had been warned repeatedly to look out for themselves, and that it was customary, when the gang of men to which the plaintiff's intestate belonged was at work on the tracks, for one of the intestate's fellow employees to be posted nearer the station, where he could see down the curve to give warning of approaching trains, but that at the time of the accident no such man was at this post for the reason that all the men of the gang, with the exception of the plaintiff's intestate, had left the tracks for other work, that the plaintiff's intestate remained behind and was bending over to pick up some blocking, when he was struck by the tender of a locomotive which was backing from the direction of the station and was drawing a train of cars on one of the main outward tracks. There was some evidence that it had been a custom for trains coming from the terminal station to ring a bell and that no one heard the bell of this engine ring, that the defendant knew that the work of the city was going on and that the train which caused the injury did not stop. *Held*, that there was no evidence for the jury of gross negligence of any of the agents or servants of the defendant.

TORT by the administratrix of the estate of John Devine late of Boston, who also was his widow, for the benefit of herself and their children, against the New York, New Haven, and Hartford Railroad Company, under R. L. c. 111, § 267, for causing the death of the plaintiff's intestate on January 15, 1904, by reason of its negligence and the unfitness and gross negligence of its agents and servants while engaged in its business, while the plaintiff's intestate was in the exercise of due care and was at work as a laborer in the employ of the city of Boston. Writ dated November 21, 1904.

In the Superior Court the case was tried before *White, J.*, who ruled that upon the evidence the plaintiff was not entitled to recover, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

L. K. Clark, for the plaintiff.

J. Wentworth, for the defendant.

RUGG, J. This is an action under R. L. c. 111, § 267, to recover for the death of John Devine, who was an employee of the city of Boston and who lost his life under these circumstances: For about three months he had been at work with others under the charge of an assistant superintendent of the Boston Water Works in lawfully laying a water pipe across the location of tracks operated by the defendant, at a place not far from the

South Terminal Station and near the yard for passenger coaches and the coaling station for locomotives, where there were many tracks, and trains and locomotives were constantly passing and repassing, both backing and going forward. There was a bridge over the tracks and a curve near by, so that trains coming from the South Station were visible for about two hundred feet from where the accident occurred; and there was evidence tending to show that when a locomotive was coming from that direction, tender forward, it was impossible from the cab to see the track where the plaintiff was. It was customary, when the gang of men to which the plaintiff's intestate belonged was at work on the tracks, for one of his fellow employees to be nearer the station, where he could see down the curve, to give warning of approaching trains; but at the time of the accident no such man was at this post for the reason that all the men, with the exception of the plaintiff's intestate, had left the tracks for other work. The plaintiff's intestate remained and was bent over to pick up some blocking, when he was struck by the tender of the locomotive, which was backing and drawing a train of cars on one of the main outbound tracks.

In order to recover the plaintiff must show that the death of her intestate was due either to the negligence of the defendant or to the unfitness of its employees or their gross negligence. There was no evidence of the negligence of the defendant or of the unfitness of its employees. But it is urged that a finding of gross negligence, on the part of those in charge of the locomotive by which the plaintiff was struck, could be supported on the ground that there was some evidence to the effect that it had been a custom for trains coming from the South Station to ring the bell, and no one heard the bell of this engine ring; and that the defendant knew the work of the city of Boston was going on and that the train which caused the injury did not stop. The plaintiff's witnesses all testified that it was a very noisy place by reason of the constant running of trains, and that all the employees of the city had been repeatedly warned to look out for themselves, and that, in addition, when they were at work a guard was stationed to give them the alarm of an approaching train.

These circumstances fall far short of establishing that carelessness on the part of the servants of the defendant, manifestly

materially greater than want of common prudence, which is necessary in order to reach gross negligence. A substantially and appreciably greater degree of negligence than failure to exercise ordinary care must be shown before the heedless and palpable disregard of the safety of others is proved, which characterizes that excess of ordinary negligence, termed "gross" in the statute. *Brennan v. Standard Oil Co.* 187 Mass. 376. *Lanci v. Boston Elevated Railway*, 197 Mass. 32. *McNamara v. Boston & Maine Railroad*, 202 Mass. 491. *Martin v. Boston & Northern Street Railway*, ante, 16. *Galbraith v. West End Street Railway*, 165 Mass. 572, 581. *Nauss v. Boston & Maine Railroad*, 195 Mass. 364. *Pearlstein v. New York, New Haven, & Hartford Railroad*, 192 Mass. 20, 27.

The plaintiff's intestate was working in a highly dangerous place, over which the defendant's servants were obliged to run its trains in the performance of its duties to the public. The evidence all shows that the employees of the city were expected to, and in fact did except on this single occasion, look out for their own safety. There is nothing to indicate that there was any duty on the part of the defendant's employees to ring the bell at that place, or that, in view of all the noise in the neighborhood, anybody could or did rely upon warning from that source. They were justified in assuming that the plaintiff's intestate would himself exercise a standard of care commensurate with his peril. He was stooping at the side of the track, after all his fellows had left the vicinity, without taking care to look for an oncoming train after it was in sight or having any one else to look out for him. Although the defendant's employees may have known that the work in which the deceased was engaged was going on, yet they may have been assumed to know also that, when the city's men were in a place of danger on the tracks, one of their number was always stationed near the curve to give warning for their protection; and his absence on this occasion may well have been taken by the defendant's employees as indicating that they could proceed without apprehension of the presence of any city workmen.

Exceptions overruled.

DAVID L. BOLGER vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 9, 1910. — March 23, 1910.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & RUGG, JJ.

Husband and Wife. Damages, In tort.

In this Commonwealth there is no difference between a husband and a wife as to the right to recover for loss of consortium, and where a husband as administrator of the estate of his wife has recovered damages in an action of tort against a corporation operating a street railway for personal injuries sustained by his wife while a passenger in a car of the defendant, in an action brought by him personally against the corporation for consequential damages arising from the same injuries to his wife, he can recover only for the expenses to which he was put in the care and attempted cure of his wife, and can recover nothing for loss of consortium.

MORTON, J. In *Nolin v. Pearson*, 191 Mass. 283, it was held in accordance with the great weight of authority in this country that the right of the wife to maintain an action to recover damages caused by the loss of her husband's consortium through the wrongful act of a third party stood on an equal footing with the right of the husband to maintain an action for the loss of the wife's consortium, and that the common law which limited the right to maintain such an action to the husband had been abrogated as the result of various statutes which had been enacted from time to time in regard to the rights of married women. In that case the wife was allowed to maintain an action for loss of her husband's consortium arising out of the alienation of his affection by the defendant and the procuring and enticing him to leave her and absent himself from her house. From the nature of the action no recovery could have been had by the husband, and unless an action could be maintained by the wife the defendant would have escaped all liability for the wrong done.

The present action goes beyond the case of *Nolin v. Pearson*, *supra*, and presents a different question. The plaintiff seeks to recover for the loss of his wife's consortium and for expenses incurred by him as the result of injuries received by her while a passenger in a car belonging to the defendant company, from which she subsequently died. He also seeks to recover in

another action as administrator of his wife's estate for the injury and conscious suffering sustained by her. The two actions were tried together. In the first there was a verdict for the plaintiff of \$2,500, and in the second of \$3,000. Subsequently motions for new trials were filed in both cases. The presiding judge* refused to disturb the verdict in the case by the administrator, but suggested, in view of the decision in *Feneff v. New York Central & Hudson River Railroad*, 203 Mass. 278, which had been reported since the trial, that the plaintiff was not entitled to recover in the first action for loss of consortium and that the verdict should be reduced to \$750, which it was agreed was the expense to which the plaintiff had been put for the care and attempted cure of his wife. Thereupon, at the suggestion of the defendant and with the consent of the plaintiff, the presiding judge reported that case to this court upon terms which present in effect the question whether the plaintiff is entitled to recover for loss of consortium, or whether his right to recover is limited to the expense incurred by him for medical care and attendance upon his wife. If he has a right to recover for loss of consortium, then the verdict for \$2,500 is to stand; otherwise, it is to be reduced to \$750.

We do not see why the case of *Feneff v. New York Central & Hudson River Railroad*, *supra*, is not decisive of this case. No valid distinction can be drawn between the husband's right to recover for the loss of the wife's consortium, in cases growing out of the negligence of a third party, and the wife's right to recover for loss of the husband's consortium in like cases. Neither can it make any difference that in the case of the wife the loss of consortium is or may be the sole ground of recovery and in the case of the husband it is or may be one of several grounds of recovery.

The result is that in accordance with the report the verdict is to be reduced to \$750.

So ordered.

The case was submitted on briefs.

A. S. Apsey, D. H. Coakley & W. M. Hurd, for the plaintiff.

C. F. Choate, Jr., J. L. Hall & R. A. Stewart, for the defendant.

* *Raymond, J.*

JOHN F. CALLAHAN vs. BOSTON ELEVATED RAILWAY
COMPANY.

Suffolk. March 16, 1910. — March 23, 1910.

Present : KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, In use of highway. Street Railway.

Owing to the fact that street cars run on rails and cannot turn out, persons traveling on the same highway by other methods must regard this limitation, and if when a car is approaching they are upon the part of the way which is between the rails they should leave that space at once if reasonably practicable ; but travellers in vehicles are not obliged to be constantly on the watch to observe the approach of a car from behind and under ordinary circumstances rightfully may assume that the driver of such a car will use common prudence to avoid collision with persons who are exercising their rights as travellers with ordinary care.

In an action against a corporation operating a street railway, for personal injuries from being run into by a car of the defendant while the plaintiff was driving a pair of horses attached to a heavy wagon on a street of a town in winter after dark, if it appears that the portion of the way outside the tracks of the defendant was covered with ice and snow and that the footing for the plaintiff's horses was better between the rails where there was no ice and where the plaintiff had been driving at a walk for about five minutes when the car of the defendant ran into him from behind, the questions of the due care of the plaintiff and the negligence of the defendant are for the jury.

TORT for personal injuries received by the plaintiff from being run into from behind by an electric car of the defendant while the plaintiff was driving in a two horse caravan along Boylston Street in Brookline at about seven o'clock in the evening of January 15, 1907. Writ dated February 6, 1907.

In the Superior Court the case was tried before *Raymond, J.* The circumstances of the accident, as shown by the evidence, are stated in the opinion. At the close of the plaintiff's evidence, the judge ruled that on all the evidence the plaintiff could not recover, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

R. W. Frost, (J. W. McCormack with him,) for the plaintiff.
W. E. Monk, for the defendant.

RUGG, J. The plaintiff was driving in a heavy wagon after dark upon a broad street in the town of Brookline. The por-

tion of the way outside the tracks of the defendant company was covered with ice and snow, and the footing for his horses was better between the rails where there was no ice and where he had been driving at a walk for about five minutes, when a car of the defendant going in the same direction ran into him from behind and caused the injuries, for which this action is brought.

A street railway company, by reason of the grant to it of a location for its tracks in a highway, gains no right to the exclusive enjoyment of that portion where its rails are laid. The rest of the travelling public also may go upon it, provided there is no unreasonable interference with the progress of the cars of the street railway. The fact that street cars can only proceed upon rails gives to them a certain preference. Others must respect the limitations under which travellers in street cars labor as to their inability to turn out, by not unduly obstructing the track. On learning of the approach of a car other travellers upon that part of the way should leave the rails at once if reasonably practicable. But travellers in vehicles are not obliged to be constantly upon the watch to observe the approach of a car from behind. They may rightfully assume under ordinary conditions that the driver of the car will exercise common prudence to avoid collision with others exercising their rights as travellers with ordinary care. These principles were early declared and have been constantly adhered to in determining the relative rights of these two kinds of travellers upon highways. *Commonwealth v. Temple*, 14 Gray, 69. *Vincent v. Norton & Taunton Street Railway*, 180 Mass. 104. *Sexton v. West Roxbury & Roslindale Street Railway*, 188 Mass. 139. *Kerr v. Boston Elevated Railway*, 188 Mass. 434. *Williamson v. Old Colony Street Railway*, 191 Mass. 144, 147. *Logan v. Old Colony Street Railway*, 190 Mass. 115. *Chaput v. Haverhill, Georgetown & Danvers Street Railway*, 194 Mass. 218. *Jeddey v. Boston & Northern Street Railway*, 198 Mass. 232.

The circumstances disclosed in the case at bar made it necessary to submit to the jury both the due care of the plaintiff and the negligence of the defendant. The plaintiff was in a place where he had a right to be, and he may have been found to have been justified in apprehending no danger of collision from behind

without warning. This case is plainly distinguishable from those where a pedestrian, with no sufficient excuse, has either stopped in front of, or failed to avoid, an oncoming car.

Exceptions sustained.

MARY A. FRENCH vs. PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, AMMON P. RICHARDSON, claimant.

Suffolk. March 18, 1910. — March 23, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Insurance, Life, change of beneficiary.

A policy of life insurance contained the following provision: "This policy is issued with the express understanding that the assured may, with the consent of the society [the insurer] and provided this policy be not then assigned, change the beneficiary or beneficiaries at any time during the continuance of this policy, by filing with the society a written request, duly acknowledged, accompanied by this policy, in which case it is understood that such change will take effect upon the endorsement of the same on this policy by the society." The insured, who was a married woman, caused her husband to be made the beneficiary under the policy. Later she signed and acknowledged an application to the company to make the policy payable to her mother instead of to her husband, but was unable to find the policy, and was told by an agent of the company that the policy must be delivered to the company to complete the change of beneficiary by an indorsement thereon or that a certificate of the loss of the policy must be filed with the company. She said that when she found the policy she would send it to the agent. A few days later a blank for a certificate of loss of policy was mailed to her. The agent kept the application of the insured for a change of beneficiary, and did not present it to the company until after the death of the insured. The insured died more than four months after the making of such application, but never sent to the company either the policy or a certificate of its loss. Shortly before her death she said that she had made out her life insurance to her mother. In an action to determine whether the husband or the mother of the insured was the beneficiary under the policy at the time of the death of the insured, it was *held*, that the husband was such beneficiary, and that there was no evidence which would warrant a finding that there had been a change of beneficiary from the husband of the insured to her mother.

CONTRACT on a policy of life insurance issued by the Provident Savings Life Assurance Society of New York, which company, as defendant, paid the amount in question into court, and was stricken out as a party to the action. Ammon P. Richardson, the husband of the insured, who had filed a petition as claimant of the fund, was made a party. The parties

claiming the fund were the plaintiff, Mary A. French, the mother of the insured, and Ammon P. Richardson, the husband of the insured, each claiming to be the beneficiary under the policy. Writ in the Municipal Court of the City of Boston dated October 9, 1908.

On appeal to the Superior Court the case was tried before *Fox, J.* The evidence showed that on or about September 9, 1905, the Provident Savings Life Assurance Society of New York made a contract of insurance on the life of Fannie A. French of Andover, wherein Mary A. French was made beneficiary ; that the policy contained the provision in regard to a change of beneficiary which is quoted in the opinion ; that on October 10, 1906, the insured, Fannie A. French, was married to Ammon P. Richardson of Andover ; that on December 1, 1906, there was a change of beneficiary under the contract of insurance from the mother, Mary A. French, to Ammon P. Richardson, the husband of the insured ; that this change was made in strict conformity with the conditions of the contract ; that the change was not known to the original beneficiary ; that on or about May 2, 1908, there was a valid execution of a requisition for a change of the beneficiary from Ammon P. Richardson back to Mary A. French ; and that the insured signed this requisition and delivered it to one Hinckley, an agent for the insurance company. The testimony of Hinckley was substantially as follows: That he was the general and soliciting agent for the insurance company at the time this policy was issued ; that he solicited the policy on the life of Fannie A. Richardson, and that it was duly issued to her with Mary A. French as beneficiary ; that he subsequently, at the request of the insured, completed the change of beneficiary from Mary A. French to Ammon P. Richardson ; that on or about May 2, 1908, in response to a request by letter, now lost, from the insured to him, he went to Andover for the purpose of completing another change of beneficiary from Ammon P. Richardson back to Mary A. French ; that the insured signed the required requisition form and acknowledged it before the witness as a notary, the acknowledgment showing the date of July 25, 1908, which date was omitted by the witness through mistake at the time and later was filled in incorrectly ; that it should have borne the date of May 2, 1908 ; that after the comple-

tion of the requisition the insured on looking for the policy was unable to find it, and after searching said that she could not find it but that when she found it she would send it to the Boston office; that she was told by the witness that the policy must be surrendered to complete the change, or that a certificate of lost policy must be filed; that the requisition was taken to the Boston office of the company by the witness, and there remained until some time subsequent to the death of the insured, when it was forwarded to the home office of the insurance company, together with the policy. There was evidence tending to show that on or about May 7 a letter was sent to the insured enclosing a certificate for use in case of a lost policy to be filled out by the insured, together with a request to the insured so to fill it out and return it to the Boston office. The insured died on August 10, 1908.

Upon these facts the judge ruled that the intended change of beneficiary from the husband to the mother was ineffectual under the provision in the policy, and that the husband, Ammon P. Richardson, therefore was entitled to receive the fund. He ordered a verdict for the claimant, and reported the case for determination by this court. If his ruling was correct, the verdict was to stand; otherwise, such judgment or order was to be entered as this court should determine.

C. J. Stone, for the plaintiff, submitted a brief.

L. C. Coggan, for the claimant.

RUGG, J. The defendant issued a policy of insurance on the life of one Fannie A. Richardson, in which, previous to May, 1908, her husband, the claimant, had been made beneficiary. Thereafter she sent for an agent of the defendant and said to him that she desired to make the policy payable to her mother instead of her husband. On May 2, 1908, she signed and acknowledged the usual form for such change of beneficiary, but, being unable to find the policy, was told by the defendant's agent that the policy must be surrendered to the company to complete the change or a lost certificate be filed, and she said that when she found the policy she would send it to the agent. A few days later a blank certificate for a lost policy was mailed to her. The agent took with him and kept the request for change of beneficiary, but did not send it to the defendant until after the

death of the insured. The defendant never received any certificate for lost policy nor was the policy itself surrendered for the completion of the change of beneficiary. The insured stated shortly before her death on August 10, 1908, that she had made out her life insurance to her mother. The clause in the policy as to change of beneficiary was as follows:

“ This policy is issued with the express understanding that the Assured may, with the consent of the Society and provided this Policy be not then assigned, change the beneficiary or beneficiaries at any time during the continuance of this policy, by filing with the Society a written request, duly acknowledged, accompanied by this Policy, in which case it is understood that such change will take effect upon the endorsement of the same on this Policy by the Society.”

The only evidence as to the knowledge by the defendant of the attempt of the insured to change the beneficiary was that it had at some time copies of the letter of its agent, dated May 7, 1908, to the insured, to the effect that it would be necessary for the company to have the policy in order to make the change of beneficiary, or the certificate for lost policy properly executed, and of a letter from its Boston cashier to the same agent stating that if nothing further had been done about the change of beneficiary the return of the application therefor was desired.

The single question presented is whether the mother or the husband of the insured is entitled to the insurance. The husband was properly designated as beneficiary. Did the acts of the insured amount to a change of designation in favor of her mother? It is to be observed that this is not a case where the insured had done all in her power to effect a change. She did not return the policy to the company and she kept the certificate of lost policy more than three months without returning it to the company. No reason is apparent for not doing one or the other, if she continued constant in her desire to change the beneficiary. Nor is it a case where she had acted with despatch to accomplish the wished for result and her death has supervened before all the formalities have been complied with. Nor did she make for a sufficient consideration a legal assignment of the policy and all rights under it, nor were there such changes in the relations between her and the beneficiary as to make it inequitable or

contrary to the rules of the defendant, or of a statute, for him to enforce his claim. Moreover the defendant did not waive the provisions of the policy and accept the new designation as valid. Apparently its responsible officers had no notice or knowledge of it until after the decease of the insured. These circumstances, if present, would make a different case from that before us, where other considerations would need to be discussed. The provisions of the present insurance contract plainly pointed out the way in which the beneficiary might be changed; they were clearly called to the attention of the insured, and the means were placed in her hands for complying with them. The signing of the request for such a change was, as she well knew, but one step, and that an indecisive one, in the process of substitution. Her failure to perform the other acts necessary to complete the designation of a new beneficiary rendered what she had done wholly unavailing. It was an incomplete attempt looking in that direction, which falls so far short of complying with the terms of the contract as to be of no effect. The express stipulation was that the time when a change of beneficiary should go into effect was its endorsement upon the policy. *McCarthy v. New England Order of Protection*, 153 Mass. 314, 320. *Clark v. Royal Arcanum*, 176 Mass. 468. *Elsay v. Odd Fellows' Mutual Relief Association*, 142 Mass. 224. *Daniels v. Pratt*, 143 Mass. 216.

In accordance with the terms of the report the verdict for the claimant is to stand.

So ordered.

CATHERINE CARROLL, administratrix, vs. BOSTON ELEVATED RAILWAY COMPANY.

Middlesex. March 22, 1910. — March 23, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, Street railway, Due care of plaintiff.

At the trial of an action against a street railway company to recover for personal injuries received in a collision between a car of the defendant and a wagon in which the plaintiff was driving, there was evidence tending to show that just previous to the collision the plaintiff was driving on the right hand side of a street in the middle of which were tracks of the defendant, that just in front of him was a milk wagon going but a little faster than a walk, that there was not sufficient room for him to get by the milk wagon on the same side of the track without coming within the range of a car that might pass, that, desiring to pass the milk wagon, he looked around and saw a car of the defendant approaching "quite a distance away so that . . . he thought that he would have ample time to get by before they [the car] could come on to him," that he thereupon tried to drive by the milk wagon, but just as he was getting by and out of danger the left hind wheel of his wagon was struck by the car and he was injured. The motorman of the car, testifying for the defendant, stated that at the time when the plaintiff looked back the car was going about eight miles an hour. *Held*, that there was evidence tending to show that the plaintiff exercised a reasonable judgment as to how far distant the car was before he attempted to pass the milk wagon, and that the questions, whether he was in the exercise of due care and whether the motorman was negligent, were for the jury.

TORT for personal injuries received by the plaintiff's intestate and caused by a wagon which he was driving being run into from behind by a car of the defendant. Writ dated September 9, 1907.

The case was tried before *Hitchcock, J.* The facts are stated in the opinion. At the close of the evidence the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

J. H. Vahey, (T. F. Vahey & P. Mansfield with him,) for the plaintiff.

F. W. Fosdick, for the defendant.

RUGG, J. This is an action of tort to recover damages for personal injuries. There was evidence tending to show that the plaintiff's intestate, driving an ordinary democrat wagon on the right hand side of a public way in which were tracks of the defendant, came upon a covered milk wagon going in the same

direction. There was room enough for him to pass the milk wagon without driving upon the tracks of the defendant, but not without getting so near as to come within the range of a passing car. Before starting to pass the milk wagon, which was going at little more than a walk, he looked and saw a car coming in the same direction "quite a distance away so that . . . he thought that he would have ample time to get by before they [the car] could come on to him." He then tried to drive by, but just as he was getting past it and out of danger the car struck his rear wheel and he was injured.

The relative rights of travellers by street cars and horse drawn vehicles upon public ways have been often stated. A street railway gains no exclusive or paramount right to use that portion of the highway included within its location. It has a certain important preferential right by reason of the fact that its cars can go only upon its rails and because it is designed thus to provide for the public a means of rapid transit. But other travellers can use that part of the street as freely as any other, subject only to the limitation that they do not unreasonably interfere with the street railway cars and that they exercise ordinary prudence to avoid collision with them. Those in charge of street cars are bound to drive them with a view to these well established principles and to be reasonably careful to avoid running into other travellers upon the highway. Each kind of traveller owes a reciprocal duty to the other, and within reasonable limits may trust somewhat to the expectation that the other will perform such duty. It has been pointed out that circumstances may exist where it cannot be pronounced negligent as matter of law so to drive upon a street railway track as to require an oncoming car to abate something of its speed. *Jedfrey v. Boston & Northern Street Railway*, 198 Mass. 232.

The evidence in the present case would support a finding that the plaintiff's intestate looked before driving where it was possible for a car to hit him, exercised a reasonable judgment as to how far away the car was, and had almost reached the place in front of the milk wagon where he would have been outside the overhang of the car. The testimony of the motorman was that the speed of the car was eight miles an hour at the time the plaintiff's intestate said he looked, and it is undisputed that the

near hind wheel of his wagon was struck, circumstances which bore materially upon the correctness of the opinion formed by him as to the likelihood of his passing without danger. The cases upon which the defendant relies, of which *Holian v. Boston Elevated Railway*, 194 Mass. 74, is an example, are distinguishable in that the questions there presented related to pedestrians attempting to cross tracks substantially at right angles in front of a car, generally under quite different conditions as to distance and speed of the car, their own rate of progress and the ease of avoiding and facility of escaping danger. The due care of the plaintiff's intestate was for the jury. *Creavin v. Newton Street Railway*, 176 Mass. 529. *Coleman v. Lowell, Lawrence & Haverhill Street Railway*, 181 Mass. 571. *Callahan v. Boston Elevated Railway*, ante, 422, and cases cited. *Hatch v. Boston & Northern Street Railway*, ante, 410.

The negligence of the defendant's motorman also should have been left to the jury. It cannot be said as matter of law that his testimony, taken in conjunction with the statement of the plaintiff's intestate, would not support a finding that he negligently failed to appreciate how near his running board was to the wheel of the wagon and that a little more circumspection on his part would have averted an accident. *Wright v. Boston & Northern Street Railway*, 203 Mass. 569.

Exceptions sustained.

WILLIAM F. GREBENSTEIN vs. STONE & WEBSTER ENGINEERING CORPORATION.

Middlesex. January 14, 1910. — March 25, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Employer's liability, In use of electricity. Evidence, Competency, Admissions and confessions, Relevancy and materiality. Witness, Deposition. Practice, Civil, Conduct of trial, Interrogatories, Entry of judgment, Amendment. Supreme Judicial Court. Election.

One, who had been set at work by his employer at stripping the lead covering from certain wire cables used for conducting electricity and who knew of the risk of working upon or near to such cables when they are heavily charged,

so that there was no duty on the part of the employer to warn him as to the danger attending the work, cannot maintain an action against his employer at common law, whatever his rights may be under St. 1909, c. 514, § 127, cl. 2, for injuries sustained by him because of the negligence of a foreman under whom he worked in assuring him that the work could be done safely and in telling him that the electricity had been shut off from the cables and in ordering him to use an improper tool for the work, such foreman being his fellow servant.

There is no duty incumbent upon an employer to warn an employee, who for some weeks has been at work for the employer at an electric power house and who on a certain day has been set at work at stripping the lead covering from wire cables used for the conducting of electricity, of the general danger in working upon or near such cables when they are heavily charged with electricity, especially when the employee is fully aware of such risk.

A plaintiff should not be allowed in cross-examination of a witness for the defendant to show that there had been an attempt or offer to compromise the plaintiff's claim.

In proving incompetency of a servant of the defendant in an action for personal injuries by an employee against his employer, evidence of a previous accident to the plaintiff caused by the negligence of the servant is not competent.

It cannot be said as a matter of law that it was not within the discretion of the judge presiding at a trial to permit the reading to the jury of a portion of the cross-examination of a witness whose testimony was taken by deposition, in which the cross-examiner read to the witness a long report by another person of an interview which he had had with the witness, which report was set out in full in the deposition, and which the witness in effect assented to as a true report of the interview, for the purpose of showing through a question immediately following the reading of the report, by the fact that there was no account in the report of a certain fact as to which the witness previously had testified, that the witness had first told any one of that fact at a time subsequent to the interview, although the report thus read to the witness contained many matters in themselves wholly immaterial and incompetent.

Even under the provisions of R. L. c. 178, § 57, before their scope was broadened by the enactment of St. 1909, c. 225, a defendant in an action of tort for personal injuries whose answer was merely a general denial had a right to interrogate the plaintiff upon any specific facts which would go to support his defense of a general denial, subject to the limitations stated in the statute itself, and was not limited to interrogatories as to matters upon which he had the burden of proof.

Where a bill of exceptions of a defendant in an action by an employee against his employer to recover for personal injuries, in which the declaration originally contained six counts, some at common law and some under R. L. c. 106, § 71, stated that at the close of all the evidence, after the counsel had conferred with the presiding judge, the judge at the request of the plaintiff's counsel and against the objection of the defendant allowed the plaintiff to strike out all but the first count of his declaration and to amend that count, and the plaintiff had a verdict, and where this court was of opinion that the issue on the common law count had been fully heard and tried and that the plaintiff could not recover at common law, but that the plaintiff might possibly have recovered under one of his counts under the statute, it was held that upon the record this court did not have the means of determining whether the circumstances, including the conference with the judge, were such that the plaintiff ought to be held to the election which he had made; and therefore the defendant's exceptions were sustained and the case was remanded to the Superior Court to ascertain whether, upon the facts

that might be shown, justice required that the plaintiff should be bound by the election which he had made at the trial, or whether he should be allowed to amend his declaration by striking out the single count which was left in the declaration as amended and substituting therefor a count or counts under R. L. c. 106, § 71.

TORT for personal injuries received by the plaintiff while at work for the defendant at the power house of the Boston Elevated Railway Company in that part of Boston called Charlestown. Writ dated November 15, 1907.

The case was tried before *Bond J.* During the course of the trial the deposition of one Waterman, taken at the request of the defendant, was read. In the deposition it appeared that Waterman was a fellow employee of the plaintiff. He testified in direct examination with regard to a conversation with the plaintiff previous to the accident in part as follows: A. "Well, I asked him [the plaintiff] if he had ever done it [the work of 'skinning cables']". He said he had. I said: 'Have you ever done that kind of work'? He said he had. That is my recollection of it." In cross-examination with regard to the same matter there was the following testimony: "Q. Mr. Waterman, tell us, if you will, what is the fact with reference to that? Mr. Arnold [counsel for the defendant] understood you to say that Grebenstein told you that he hadn't done the work. I understood you to say that Grebenstein told you that he had done the work. Which was it you said? A. Mr. Grebenstein said—he didn't say he had done the work. Now, I will tell you what he did say. He said, 'We will fool them; we will show them we can do the work.' That is Grebenstein's words, now, exactly. . . . — Q. When was it that you first told that to anybody, Mr. Waterman? . . . A. I could not say that. — Q. Was it in Mr. Thompson's* office in Boston? A. I believe it was at Mr. Thompson's office. . . . — Q. And that was last January? A. Yes, sir. — Q. Mr. Waterman, you made a statement to Mr. Moore, did you, and I am going to read the entire statement to you, Mr. Waterman, to see if you can recall the statement?"

Subject to an exception by the defendant, the plaintiff's counsel then was permitted to read to the witness a statement

* Mr. Thompson was counsel for the Boston Elevated Railway Company, an action against which by the same plaintiff was tried at the same time with this action.

covering forty-two lines of the printed record. The first twenty-nine lines of the statement contained a description of the work which the plaintiff, the witness and others were doing immediately preceding the accident. The remainder of the statement was as follows: "The work was entirely new to Billy [the plaintiff] and he was not fit for such work. It requires men of experience to safely do such work. I knew how to do it and I was the first to show Billy. I cleaned the first cable and Billy watched me do it, to see how it was done. Billy had the hammer . . . a screw-driver, the cable-knife we used between us, and I had it at the time of the explosion. Billy did not have the knife at the time of the explosion. I looked at the cable after the accident and it showed plainly that something had punctured the insulation. Billy never did such work before. I know because I showed him at the beginning, and I knew by the way he went about it and did it. A green man like him ought never to have been set at work on such a job. The company are liable for putting such a man at such work."

The testimony then continued: "Q. Now, there is not anything in that, Mr. Waterman, is there, in that statement, about Billy having told you, 'We will fool them and show them how we do the work'? A. There is not anything in that statement, no. — Q. So, that, seeing that it is not in that statement, would you say that the first time you told it to anybody was to Mr. Thompson? A. I believe it was, is my recollection."

The interrogatories of the defendant to the plaintiff, which are referred to in the opinion and which the plaintiff refused to answer, were as follows:

"3. Is it not true that during the time that you worked at the Charlestown power house, prior to the said accident, said power house, so far as you have personal knowledge, was constantly in operation, that is to say, electricity was then being constantly generated?

"4. Is it not true that during the time you worked at the Charlestown power house, prior to your accident, electricity was being constantly generated and transmitted through cables to points outside said power house?

"5. Is it not true that during the entire time that you were working at the Charlestown power house, prior to your injury,

so far as you have personal knowledge, one or more of the engines furnishing power to the machines generating electricity was constantly in motion?

"6. Is it not true that on the day you were injured, and at the time you began the job of stripping lead covers from the wires or cables, being the job in connection with which you received the injury for which this suit is brought, currents of electricity were passing through said wires or cables?

"7. Is it not true that at no time after you began the job of stripping lead covers from the wires or cables, being the job in connection with which you received the injury for which you are now suing, was any new current of electricity sent through any of said wires or cables?

"8. Is it not true that at no time after you began the work of stripping lead covers from the wires or cables, being the job in connection with which you received the injury for which this suit is brought, was any new or greater current of electricity sent through the particular cable on which you were injured?

"9. Is it not true that at the time you went to work stripping lead covers from the wires or cables, that is to say, at the time you began the particular job on which you received the injury for which this suit is brought, you believed that a current of electricity was passing through some or all the wires or cables from which you were intending to strip the lead cables?

"10. At the time you began the job of stripping lead covers from the cables, being the job in connection with which you received the injury for which you are now suing, did you believe that any current of electricity was passing through any of the wires or cables from which the lead covers were to be stripped?

"11. Did you at any time after you began the work of stripping lead covers from the wires or cables, and up to the time you received your injury, believe that no current of electricity was passing through any of the wires or cables on which you worked?

"12. Is it not true that you and one Waterman were alone together at the moment you received the injury for which this suit is brought?

"13. What was inside the lead covering, a portion of which

you were engaged in removing or detaching at the time you were injured?

"14. Did you do any work upon or in connection with either the new switchboard or the old switchboard at the Charlestown power house prior to the time you received your injury, and if so, what was it?

"15. Were you, prior to the time you began to work at the Charlestown power house, familiar with the word or term 'electrician' as descriptive of a class or kind of workmen?

"16. Were you, prior to the time you received the injury for which you are now suing, working at the Charlestown power house principally or wholly as an electrician?"

Other facts are stated in the opinion. The jury returned a verdict for the plaintiff in the sum of \$30,000; and the defendant alleged exceptions.

W. G. Thompson & E. K. Arnold, (S. H. Batchelder with them,) for the defendant.

D. H. Coakley, (H. D. Moore & W. Flaherty with him,) for the plaintiff.

SHELDON, J. This is a very voluminous record; but the main question presented is comparatively simple. The plaintiff's declaration contained originally six counts, but the case finally went to the jury upon only the first one. This count, as amended, alleged that the plaintiff was employed by the defendant at work in a power house, and was negligently "directed by the one in charge under said defendant" to remove lead coverings from certain wires which were the main feeders running from the switchboard in that power house; that the defendant knew that this work was dangerous and this was not known to the plaintiff; that the defendant failed to warn him of the danger, and urged him to use at his work tools which added to the dangers thereof, as the defendant knew, but failed to warn him thereof or to instruct him as to avoiding the same, by reason whereof he was greatly injured.

The particular negligence upon which the plaintiff relied at the trial was the conduct of one McGerry in setting him to work at stripping the lead covering from certain electric wire cables, with, as the plaintiff contended, an assurance that the work could be done safely, or that the cables were "dead"; and fur-

ther in ordering him to use a chisel instead of a hammer in doing the work. This occurred some weeks after the plaintiff had begun work at the power house. The cables were not dead; the plaintiff in removing the lead from one of them apparently cut also through the rubber insulation which was underneath the lead; and he suffered a violent shock of electricity through which he received the serious injuries complained of.

McGerry was at least a foreman, and it may be that he was a superintendent for whose negligence the defendant could have been held liable under R. L. c. 106, § 71, cl. 2, now St. 1909, c. 514, § 127, cl. 2. But McGerry was still a fellow servant of the plaintiff; the defendant could not be made answerable at common law for his negligence; *Colford v. New England Structural Co.*, ante, 283; and it was only upon a count at common law that the plaintiff finally relied. There was no duty incumbent upon the defendant to warn the plaintiff of the general danger of working upon or near to heavily charged electric wire cables, both because that was one of the obvious risks of his employment and also because he was fully aware of that risk. *Chisholm v. New England Telephone & Telegraph Co.* 176 Mass. 125, 127. *McIsaac v. Northampton Electric Lighting Co.* 172 Mass. 89, 91. *Beique v. Hosmer*, 169 Mass. 541, 543. *Linch v. Sagamore Manuf. Co.* 143 Mass. 206. But where the master is under no such duty, he cannot be held liable at common law for the negligent act of one servant, though of higher rank than other servants, in giving orders of which the execution results in injury to another servant. *Ahern v. Hildreth*, 183 Mass. 296. *Healey v. George F. Blake Manuf. Co.* 180 Mass. 270. *O'Brien v. Rideout*, 161 Mass. 170. *Kalleck v. Deering*, 161 Mass. 469. *Moody v. Hamilton Manuf. Co.* 159 Mass. 70. This case very much resembles *Kenney v. Shaw*, 133 Mass. 501. The plaintiff there was injured in drilling out a hole in which a previous charge of blasting material had failed to explode. He was set to do this work by a superintendent, with an implied assurance of safety. It was held that he could maintain no action at common law against his employer, although he now could have a remedy under the statute. *Malcolm v. Fuller*, 152 Mass. 160.

It follows that the plaintiff could not maintain his action upon the only count which was submitted to the jury; and a verdict

should have been ordered for the defendant in accordance with its first request.

The plaintiff ought not to have been allowed, in cross-examining Buckley, to show that there had been an attempt or offer to compromise the plaintiff's claim. This was wholly wrong, and it was manifestly injurious to the defendant. The ruling cannot be supported on the ground that material admissions made by a party may be proved against him, though made in the course of negotiations for a settlement, which by themselves are inadmissible. *Marsh v. Gold*, 2 Pick. 285, 289, 290. *Gerrish v. Sweetser*, 4 Pick. 374. *Dickinson v. Dickinson*, 9 Met. 471. *Upton v. South Reading Branch Railroad*, 8 Cush. 600. *Gay v. Bates*, 99 Mass. 263. *Draper v. Hatfield*, 124 Mass. 53. *Higgins v. Shepard*, 182 Mass. 364. No such admissions were sought to be shown, even if Buckley had authority to make them, which was not shown.

Evidence of the previous accident to the plaintiff was incompetent. It had no proper bearing upon any of the issues in the case. *Aiken v. Holyoke Street Railway*, 184 Mass. 269, 274. *Dean v. Murphy*, 169 Mass. 413. *Burgess v. Davis Sulphur Ore Co.* 165 Mass. 71, 75. *Maguire v. Middlesex Railroad*, 115 Mass. 239. *Collins v. Dorchester*, 6 Cush. 396. The competence of McGerry was one of the issues when the evidence was received;* but evidence of a specific act of negligence on his part was not competent upon that issue. *Olsen v. Andrews*, 168 Mass. 261, 265, and cases cited.

We cannot say that the judge might not in the exercise of his discretion allow the statement of Waterman to be read to the jury. It contained much matter that was wholly immaterial, but it might be found to be in some respects inconsistent with parts of the testimony which Waterman had given. It would have been better to allow the jury to hear only those parts of the statement which did tend to vary or control his previous testimony. But it could be found that this was one connected statement of the whole matter as it then lay in Waterman's

* The sixth count of the declaration, with specifications in regard thereto, alleged incompetency of McGerry. At the close of all the evidence the presiding judge permitted the plaintiff to amend the first count and to strike out all of the other counts of the declaration.

memory; and the course adopted cannot be declared as matter of law to be wrong.

It was provided by R. L. c. 173, § 57, that either party to an action might "file . . . interrogatories to the adverse party for the discovery of facts and documents material to the support or defense of the action." The scope of this section has been much broadened by St. 1909, c. 225, which took effect five days after the Superior Court had ruled upon the interrogatories filed by the defendant in this action. The rights of the parties, accordingly, must be decided upon the earlier statute.

Under this statute it has been said that the right of either party to file interrogatories was limited to such matters as were material to the support of his own case, and did not extend to matters in support of the case of the adverse party. *Wilson v. Webber*, 2 Gray, 558. *Sheren v. Lowell*, 104 Mass. 24, 27. *Wetherbee v. Winchester*, 128 Mass. 293. *Davis v. Mills*, 163 Mass. 481. But this does not mean that he could file interrogatories only as to matters upon which he had the burden of proof, or that a defendant whose answer was merely a general denial could not require the plaintiff to answer any interrogatories. *Smith v. Beaufort*, 1 Hare, 507, and 1 Phillips, 209. In our opinion, such a defendant had the right to interrogate the plaintiff upon any specific facts which would go to support his defense of a general denial, subject of course to the limitations stated in the statute itself. This follows from the reasoning of the court in the cases above cited. And see *Gunn v. New York, New Haven, & Hartford Railroad*, 171 Mass. 417; *Robbins v. Brockton Street Railway*, 180 Mass. 51; and *Carroll v. Boston Elevated Railway*, 200 Mass. 527. The plaintiff therefore ought to have been required to answer some at least of the interrogatories put to him, and it does not appear that they called upon him to disclose either the names of his intended witnesses or the manner in which he proposed to prove his case. R. L. c. 173, § 63. But as the case has turned, the defendant has not been prejudiced by the refusal of the court to require answers to any of those interrogatories. The plaintiff is unable to maintain his action upon the only count now left in the case. If the Superior Court shall allow him to amend his declaration, that court will prescribe the terms upon which he may do so. If, upon the

position of the case at that time, justice shall require that the defendant be allowed to file new interrogatories to the plaintiff under the broader privilege given by St. 1909, c. 225, the Superior Court undoubtedly will allow that to be done.

We do not deem it necessary to consider the other exceptions. They may not be again presented in the same way.

The defendant asks us to order judgment in its favor, under the provisions of St. 1909, c. 236. But that statute is permissive only, not mandatory; and upon the facts now appearing justice does not require us to make such an order without more. We do not doubt that if at the end of a long and expensive trial a party has voluntarily and deliberately chosen to put his case or his defense upon one ground rather than another, or has elected to seek one remedy rather than another, both or either of which might have been open to him, he ordinarily should be held to abide by his choice. This was done in *Kiely v. Corbett*, ante, 158. But we do not know fully what the circumstances were in the case at bar. The exceptions state that "at the close of the evidence, after counsel had conferred with the court," the court at the request of the plaintiff's counsel and against the objection of the defendant, allowed the plaintiff to strike out all but the first count of his declaration and to amend that count. The plaintiff had a verdict upon this count. But, as we have seen, a verdict should have been ordered thereon for the defendant, although the plaintiff might perhaps have recovered upon his counts upon the statute, if those had been submitted to the jury. We have not the means of determining whether the circumstances, including the conference with the judge, were such that the plaintiff ought now to be held to the election which he then made. Upon these facts we are of opinion that he ought not to be allowed to retry the issue of the defendant's liability at common law, which has been fully heard and tried out; *Archer v. Eldredge*, 204 Mass. 323; but that it should be left to the Superior Court to ascertain, whether upon the facts that may be shown justice requires that the plaintiff should be bound by the election which he made at the trial, or whether he should be allowed to set up again the claim which he then abandoned and to amend his declaration by striking out the single count now left therein, and substituting therefor counts under R. L.

c. 106, § 71, the act which was in force at the time of his injury, and the provisions of which are now contained in St. 1909, c. 514, § 127.

Accordingly the defendant's exceptions are sustained, and judgment will be entered for the defendant unless the Superior Court shall, within thirty days from the filing of the rescript in that court, and upon such terms as it may prescribe, allow the plaintiff to amend his declaration as already stated.

So ordered.

CARLETON HUNNEMAN & another vs. LOWELL INSTITUTION
FOR SAVINGS & another.

Suffolk. January 20, 1910. — April 11, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Execution, Discharge, Assignment, Levy. Payment. Equity Jurisdiction, Right of creditor attaching real estate subject to mortgage to reach surplus after foreclosure sale. Attachment. Equity Pleading and Practice, Parties, Demurrer, Bill, Amendment, Decree, Remanding of case to Superior Court from Supreme Judicial Court for further hearing upon merits. Supreme Judicial Court.

In a suit in equity by the assignee of a judgment creditor to enforce an execution issued upon the judgment, it appeared that in the action in which the judgment was entered the creditor had attached real estate of the defendant and that the defendant also, without discharging the attachment, had given a bond with a surety company as surety conditioned upon the payment of whatever judgment the creditor should procure, that after the creditor had procured the judgment the surety company paid to him the amount of it and the creditor assigned to the surety company all his rights under the judgment and execution, and that it was the express intention of both parties to the transaction that it should be a sale of the creditor's rights under the judgment and execution with the purpose of keeping the execution alive and not a "payment under the execution." *Held*, that the execution was not satisfied and was still alive.

In an action of contract an attachment of real estate of the defendant was made. Certain mortgages of the defendant to a savings bank were entitled to priority over the attachment. On a June 1, the plaintiff recovered judgment and an execution issued, which was delivered to a deputy sheriff, whose return showed that he "seized and took" all the right, title and interest which the judgment debtor "had (not exempt by law from attachment or levy on execution) on" June 30, that being the time "when the same was taken on execution." Nothing further was done by the deputy sheriff, and on July 28 the savings bank sold the real estate in foreclosure of its mortgages. *Held*, that the levy by the deputy sheriff was upon the interest in the real estate existing at the time of the levy and not upon the interest attached upon mesne process, and that the

title which had been gained by the attachment therefore was lost before the foreclosure sale by the lapse of the thirty days after which, by R. L. c. 167, § 55, the attachment became of no effect.

Where a levy has been made upon the interest of a judgment debtor in certain real estate and thereafter one, who was the holder of certain mortgages which were entitled to priority over the levy, has foreclosed the mortgages by sale and, after the satisfying of the mortgage debts, holds a sum as a surplus, the judgment creditor is entitled, subject to liens, if any, which may have intervened between the time of the recording of the mortgages which were foreclosed and the time of the levy on his execution, to reach such surplus by a bill in equity and to apply it toward the payment of the judgment debt.

Where in a suit in equity to reach and apply an equitable interest of the defendant in satisfaction of a judgment debt, the bill alleges that the judgment creditor had sold and assigned his interest in the judgment to another and both the creditor and his assignee are joined as parties plaintiff and it cannot be known in advance whether or not the validity of the assignment will be questioned, a demurrer to the bill on the ground of misjoinder of parties cannot be sustained.

A bill in equity which sets out the bringing of an action at law, an attachment of certain real estate of the defendant, the procuring of a judgment, and the issuance of an execution, after which the judgment creditor sold and assigned his rights under the judgment and execution to another, and then avers that "within thirty days of the rendition of said judgment" the execution was placed "in the hands of . . . [an officer] . . . who commenced levy on the same," and that "by reason of the before-mentioned attachment" a lien was acquired by the judgment creditor upon the real estate, and that by his assignment "said lien passed with the execution to" the assignee, plainly proceeds upon the theory that the right of the assignee is based upon the attachment, and, if the right gained by the attachment has been lost because it was not enforced within thirty days after judgment, the suit, so far as it relies thereon, must fail. In this case, however, since it seemed that the issue had been fully tried, and that the plaintiff had a right to enforce a lien obtained by a levy on the interest of the judgment debtor in the real estate after judgment, though not on the interest which was attached in the action at law, the plaintiff was given an opportunity to apply in the court where the bill was filed for leave to amend his bill so as properly to set forth that right, and it was ordered that, if such amendment was allowed, a decree, which had been made for the plaintiff and from which the defendant had appealed, should stand.

On an appeal by a defendant from a decree of the Superior Court in a suit in equity, after a rescript had been sent which permitted the plaintiff to apply for leave to amend his bill so as to state grounds for relief in accordance with the facts which were found, and which directed that, if such amendment was allowed, a decree which had been entered for the plaintiff and from which the defendant had appealed should stand, one of several defendants filed in this court a motion that the case be sent back to the Superior Court for a rehearing, and, all parties having been heard in writing on the motion and it appearing that certain facts, which would be material whether the bill was amended or not, had not been called sufficiently to the attention of the trial court and had not appeared in the record which was before this court, the rescript was recalled, the decree of the Superior Court was revoked, and the case was remanded to that court for further hearing, either on the bill as it stood or as it might be amended by leave of that court.

BILL IN EQUITY, filed in the Superior Court on July 31, 1908, by Carleton Hunneman and the United Surety Company (hereinafter called the surety company) against the Lowell Institution for Savings (hereinafter called the savings bank) and Delia C. Phelps, alleging in substance that the plaintiff Carleton Hunneman on January 19, 1905, commenced an action against the defendant Delia C. Phelps and caused an attachment to be made of her real estate in the county of Suffolk to the amount of \$2,500; that a default against the defendant Phelps was entered in said action, which subsequently was removed by order of the court upon the defendant Phelps's giving a bond with the United Surety Company as surety in the penal sum of \$2,000 conditioned upon her paying to the plaintiff any judgment which he might recover in the action, but that the attachment upon the defendant's real estate was not dissolved; that on June 1, 1908, Hunneman recovered a judgment * amounting to \$1,714.37 which the surety company paid, "and by virtue of such payment became subrogated to all the rights of said Hunneman against said Phelps under said execution, and that further said execution was assigned to your petitioner United Surety Company by said Hunneman, the same at that time being satisfied in no part whatever by the defendant Phelps"; that the assignment gave to the surety company the right to collect the amount of the judgment from the defendant Phelps in Hunneman's name; that when the defendant Phelps procured the surety company to give the bond, she deposited with it \$1,036.27 which had been applied toward paying the plaintiff Hunneman, and that there was still due to the surety company, because of what it paid to the plaintiff Hunneman and of expenses which it had incurred, \$898.10 "and further costs of collection"; that the defendant Lowell Institution for Savings held mortgages upon the real estate of the defendant Phelps in the county of Suffolk which were entitled to priority over the attachments of the plaintiff Hunneman, that the bank by a sale under the mortgages on July 28, 1908, foreclosed the mortgages and that it had in its possession a surplus; that within thirty days after the rendition of the judgment in the case of Hunneman

* The case of *Hunneman v. Phelps* was before this court on exceptions of the defendant and is reported in 199 Mass. 15.

v. Phelps and previous to the foreclosure sale a deputy sheriff of Suffolk County had commenced a levy under the execution, which "levy had not been completed." The plaintiffs' statement of their legal conclusions from the facts alleged is in the opinion. The prayers of the bill were in substance that the savings bank be enjoined from paying the surplus in its hands to the defendant Phelps, that an accounting be had as to the amount of the surplus, and that the interest of the defendant Phelps in the surplus be determined and the bank be ordered to pay to the surety company "the share of" the defendant Phelps, "or so much thereof as may be sufficient to satisfy said execution and the costs of this bill." There also was a prayer for general relief.

The defendants demurred. The demurrer was overruled by *Wait, J.*, and the defendant Phelps appealed.

The case was heard upon the merits by *Dana, J.*, who found the facts to be substantially as they were alleged in the bill, and also found other facts stated in the opinion. A decree was entered directing that the plaintiff surety company recover from the defendant Phelps \$974.38 and costs, "the same to be paid by the" defendant savings bank "out of the surplus funds in its hands belonging to the defendant Phelps after the foreclosure sale." The defendant Phelps appealed.

A. L. Richards, for the defendant Phelps.

W. B. Luther, for the plaintiffs.

HAMMOND, J. The trial judge has found as a fact that at the time of the assignment by the judgment creditor to the United Surety Company, hereinafter called the surety company, it was the express intention of both parties to the transaction that it should be a sale of the execution with the purpose of keeping it alive and not a "payment under said execution." Under this finding it must be held that the execution has not been satisfied but on the contrary is still alive. *Taylor v. Van Deusen*, 3 Gray, 498. Indeed the appellant does not argue to the contrary.

The execution having been placed in the officer's hands within thirty days from the judgment, the surety company had its choice either to levy upon the interest attached upon mesne process or to seize afresh on the execution. The officer's return shows

that upon the execution he "seized and took" all the right, title and interest which the judgment debtor "had (not exempt by law from attachment or levy on execution) on the thirtieth day of June, A. D. 1908, at thirty minutes past ten o'clock A. M. (being the time the same was taken on execution) in and to the" real estate in question. It thus clearly appears that the levy was begun not upon the interest attached upon mesne process, but upon the interest existing at the time of the beginning of the levy. Several days before the foreclosure sale the right under the attachment was irretrievably lost. The right of the surety company therefore depends upon the interest acquired by the seizure upon execution of the right existing at the time of the seizure.

By this seizure the surety company secured an interest in the land. By the foreclosure sale under the power contained in the mortgage held by the bank, this interest was turned into money. Under these circumstances the surety company had an equitable lien upon the proceeds, a right which equity will enforce if the right be promptly pursued. The money in the hands of the bank belonged to the same persons as the land before the sale. For illustration of the application of this principle see *Wiggin v. Heywood*, 118 Mass. 514, and cases cited; *Worcester v. Boston*, 179 Mass. 41; *Knowles v. Sullivan*, 182 Mass. 318. For a discussion of the principle and its limitations and exceptions see among other cases *Gardner v. Barnes*, 106 Mass. 505, *Judge v. Herbert*, 124 Mass. 330, and *Western Union Telegraph Co. v. Caldwell*, 141 Mass. 489. The foreclosure sale took place July 28, 1908. The very next day the bill was filed. The surety company has therefore an equitable lien upon the proceeds of the sale, such lien being junior to all claims upon the land at the time the levy began.

It does not clearly appear from the facts found whether after satisfying such claims there is anything left for the petitioner. The trial judge seems to have been of opinion that the proceedings of the levy related back to the time of the attachment and not to the time of the seizure upon the execution, for he has found the incumbrances upon the property at the former time but says nothing about those at the latter time. In view, however, of the large surplus which came to the hands of the bank as the pro-

ceeds of the sale, and of the fact that the bank seems satisfied with the decree of the Superior Court, we infer that, no matter what may be the time at which the incumbrances are considered, there is enough left to pay the surety company.

It is urged by the appellant that it appears that several attachments were made subsequent to that of the plaintiff, and they are not shown to have been dissolved. In his return the officer states that after seizing the real estate on execution he suspended the levy by reason of prior attachments, and that "on the second day of July, 1908, the prior attachments above referred to having been disposed of," he proceeded with his levy. Neither in the answer of the bank or in that of the appellant is there anything said about these attachments; nor does it appear that at the trial their existence was relied upon or was even suggested as a ground of defense. It is true that the answer of the appellant sets up, and the master finds, that there was an attachment made by one Redding before that made by Hunneman, but the trial judge finds that there is enough to satisfy the present claim. It is to be assumed under the circumstances that the other attachments no longer exist.

The only ground of the demurrer argued before us is that there is a misjoinder of plaintiffs. But that is untenable. Although where the assignment is absolute on its face and its validity is not questioned there is no necessity that the assignor should be a party, yet where it cannot be known in advance whether or not the validity of the assignment, even although absolute on its face, will be questioned, or where there remains a right or liability of the assignor which may be affected by the decree, it is well that the assignor should be a party in order that the rights of all parties, especially the defendant, may be protected by the final decree. It manifestly could not be known in advance that the validity of this assignment would not be questioned; and indeed its validity and effect as an assignment seem to have been actually in dispute at the trial. For a discussion of the law upon this point see *Montague v. Lobdell*, 11 Cush. 111; *Jenkins v. Eliot*, 192 Mass. 474, and cases cited.

It is insisted by the appellant that the bill places the case of the plaintiffs upon the right secured by the attachment, and inasmuch as that right was not levied upon and is lost, the bill in

its present form cannot be maintained. This contention seems sound. The bill sets out the attachment, judgment and execution, and then avers that "within thirty days of the rendition of said judgment" the execution was placed "in the hands of . . . [an officer] . . . who commenced levy on the same"; and further that "by reason of the before-mentioned attachment" a lien was acquired by Hunneman upon the real estate, and that by his assignment "said lien passed with the execution to" the surety company. It is plain that the bill proceeds upon the theory that the right of the surety company to an equitable lien on the proceeds of the foreclosure sale is based upon the right secured by the attachment. But that right we have seen was not levied upon. The case of the surety company, so far as based upon that right, must fail.

Nor is the case of the plaintiffs helped by the stipulation entered into by the savings bank, because that only binds the bank to pay whatever it shall be found "chargeable with or answerable for under or by virtue of the attachment in the original action, . . . as set forth in the bill of complaint." It cannot be held to apply to the case proved. It follows that the bill in its present form cannot be maintained.

But after all the case stands upon the right seized on the execution, whether or not that be the right secured by attachment. The case seems to have been fully tried. No rights intervening between the time of the attachment and the seizure on execution appear to be outstanding except certain rights of the bank arising out of a loan made subsequent to the attachment, and there is nothing to show that there is not enough to satisfy that and also the claim in suit. Under these circumstances we think that the plaintiffs should have an opportunity to apply to the Superior Court for leave to amend the bill, upon such terms as may seem to that court just and reasonable, so as to cover the case proved. If within thirty days such an amendment be allowed, then the decree appealed from shall stand. Otherwise the bill is to be dismissed with costs.

So ordered.

After the foregoing opinion was delivered and a rescript had been sent down in accordance therewith, the counsel for the

Lowell Institution for Savings made a motion that the case be sent back to the Superior Court for a rehearing. In support of that motion he stated that on April 2 a motion such as was suggested in the opinion was made before the judge of the Superior Court who tried the case and made the final decree; and that at the hearing upon that motion it appeared that certain facts, which would be material whether the bill was amended or not, had not been sufficiently called to the attention of the trial court and did not appear in the record before us.

Counsel upon all sides having been heard in writing on the motion that the case be sent back to the trial court, and it appearing that there was a mistrial there and that the ends of justice require a rehearing, the rescript heretofore issued is recalled, the final decree of the Superior Court is reversed, and the case is remanded to that court for further hearing upon the bill as it now stands, or as it may be amended, — such amendments only to be made as shall be permitted by that court, and upon such terms as it may prescribe.

So ordered.

ARTHUR E. WHITNEY vs. MARY H. MILLER.

Suffolk. November 12, 1909. — May 16, 1910.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Deed, Construction.

One R., who was the owner of a mill pond and the surrounding land, all of which was subject to a mortgage, made a deed, to a purchaser named G., of his equity of redemption in a parcel of this land south and west of a part of the mill pond and bounded on the northerly and easterly sides by the edge of the pond. On the same day the mortgagee of all the land executed a deed of release to G. of the same parcel of land with the same description except that the northerly and easterly sides were described as bounded "by the mill pond belonging to R." Both of the deeds were acknowledged and recorded on the day of their execution and were recorded on consecutive pages of the same book in the registry of deeds. The description of the property in the deed of release from the mortgagee concluded with the words, "with all the privileges mentioned in a deed given by said R. to said G. this day and subject to all the restrictions and reservations therein mentioned." The restrictions and reservations in the deed of R. gave G. "the privilege of filling up the mill pond on the northerly and easterly sides of the aforementioned premises one rod in width from the lines above

described." "The lines above described" were "the edge of my mill pond" and "the edge of said mill pond." Upon a petition in the Land Court for a registration of the title to a lot of land covered by the mill pond which was acquired by the petitioner under a deed from the mortgagee named above, after his foreclosure of the mortgage upon the portions of the land not released from the mortgage, and which was confirmed by a deed from the assignee in bankruptcy of the estate of R., the respondent claimed title under G., and contended that the northerly and easterly boundary of his land was not the edge of the mill pond but was the thread of a certain stream on the other side of the land claimed by the petitioner, basing his contention on the ground that the partial release to G. of the mortgage mentioned above included the land claimed by the petitioner and the part of the pond which covered it. *Held*, that the two deeds to G. above described, although they were executed by different parties, could have been found to have constituted parts of one transaction and to have been made pursuant to a common understanding and arrangement on the part of all persons interested, that the privilege granted by the deed of R., the mortgagor, which was incorporated by reference in the release of the mortgagee, was inconsistent with any other construction than that the boundary of the respondent's land was the edge of the mill pond, and that a finding for the petitioner was warranted.

PETITION filed in the Land Court on April 4, 1907, for the registration of title to a parcel of land described in said petition, as follows:

"A certain parcel of land situate in Winchester in the county of Middlesex and the Commonwealth of Massachusetts, forming a part of the bed of my mill pond and particularly described as follows: Beginning at the southwesterly corner of the premises at the location of the Boston and Lowell Railroad and land of Mary H. Miller, thence running northerly by the location of said Railroad to the thread of the stream running from Wedge Pond thence turning and running easterly by the thread of said stream, thence turning and running southerly still by the thread of said stream and its confluent if any, including the Abbajona River to the point of intersection made by the thread of said stream with the southerly boundary line of land of Mary J. Price extended easterly, thence turning and running westerly by said southerly line extended easterly as aforesaid to the edge of my said mill pond, thence turning and running northerly by the edge of said pond by land of said Mary J. Price, Anna McNally and Elizabeth McCarthy, thence turning and running westerly by the edge of said pond by land of said Elizabeth McCarthy, other land of the petitioner and land of Mary H. Miller to the point of beginning."

In the Land Court the case was heard by *Davis, J.*

The land described in the petition was a part of a large tract of land partly covered by a large mill pond containing many acres and situated a little easterly from Main Street near the centre of Winchester. On the other side of Main Street was a mill about one thousand feet southerly from the locus, the water power of which was furnished by the mill pond. The mill pond was artificially created by building a dam near Main Street across the Aberjona River (spelled "Abbajona River" in the petition) in the immediate vicinity of the mill. This river is a fresh water stream, flowing in a general southerly direction, and, at a point in the easterly boundary of the locus and considerably above the dam, receives as an affluent from the west the stream running from Wedge Pond mentioned in the description contained in the petition, sometimes known as Cutter Mill Brook, which flows in a general southeasterly direction from Wedge Pond, crossing Main Street and the location of the Boston and Lowell Railroad under culverts.

The matter in issue was the ownership of that portion of the property which was shown by red lines and marked "locus" on a sketch inserted in the bill of exceptions, of which a reduced copy is printed on page 451, the red lines being indicated thus - - -

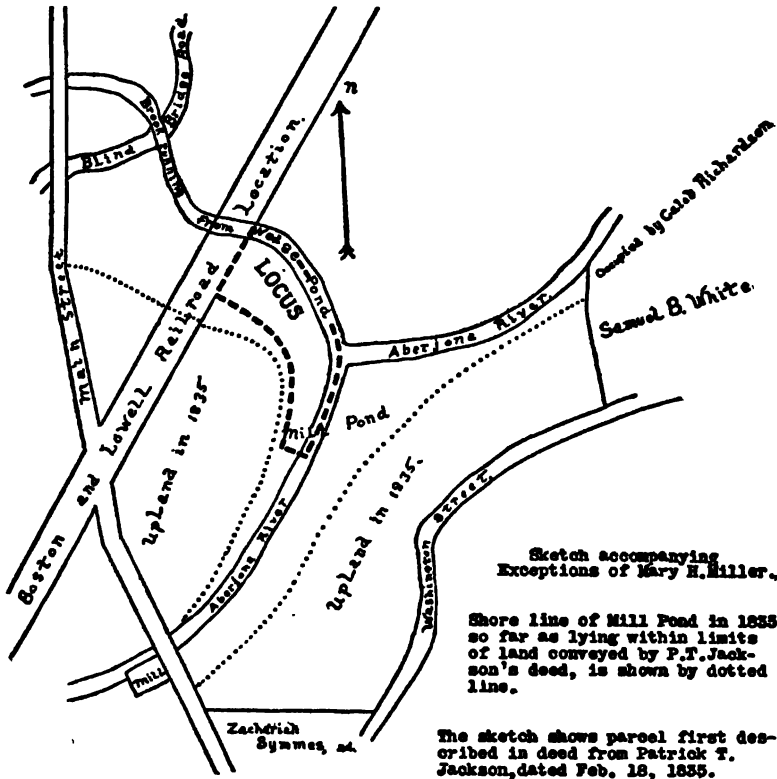
The petitioner and the respondent both claimed title under a deed of Patrick T. Jackson to Samuel S. Richardson, dated February 18, 1835, which conveyed to the grantee a mill pond in Winchester, including the land under it, together with a considerable area of margin and upland around the pond. The estate conveyed is shown generally by the sketch.

The land in controversy formed, and still formed at the time of the filing of the petition, a portion of the bed of the mill pond. Samuel S. Richardson, after acquiring the property, laid out a private way running from Main Street along the easterly side of the Boston and Lowell Railroad to the mill pond.

In 1837 Richardson executed and delivered to the president, directors and company of the Charlestown Bank three mortgages, all of which covered the premises described in Jackson's deed, including the land described in the plaintiff's petition. Samuel S. Richardson also made two other mortgages covering

the same estate, all of which mortgages were outstanding and unpaid at the time of the giving of the deed next referred to.

On August 11, 1840, Samuel S. Richardson, being then the owner of the equity of redemption, made a deed to Asahel W. Goodell, dated, acknowledged and recorded on August 11, 1840, in the Middlesex south district registry of deeds, book 395, page 332, conveying to Goodell a portion of the property containing one



acre and seven poles, more or less, and bounded on one side by the edge of the mill pond. The description in this deed was as follows: "A certain piece of land situated in the southerly part of said — Woburn — containing one acre and seven poles more or less and bounded as follows, to wit, commencing at the southwest-erly corner of the premises by land of Daniel Smith and on the easterly side — a street laid out — the line runs north twenty five degrees east parallel to the easterly line of the Boston and

Lowell Railroad and at the distance of two rods therefrom ten rods to the edge of my Mill Pond thence north eighty four degrees east along the edge of said Mill Pond twelve rods and eighteen links to a corner; thence south five degrees west still along the edge of said Mill Pond fifteen rods and nine links to a board fence; thence north seventy five degrees west by said fence nine rods and twenty one links; thence north sixty five degrees west by land of Daniel Smith six rods to the corner first mentioned, and also giving to said Goodell the privilege of using the aforesaid street which is laid out between said Railroad and the premises above described for any purpose except that of erecting buildings thereon and giving him also the privilege of filling up the Mill Pond on the northerly and easterly sides of the aforesaid premises one rod in width from the lines above described and reserving the right to flow said Mill Pond to the usual height."

On the same day, August 11, 1840, before any effectual entry to foreclose the mortgage, or either of them, the president, directors and company of the Charlestown Bank, all other outstanding mortgagees joining with them, executed and delivered to Goodell a release, acknowledged and recorded on the same day, in the Middlesex south district registry of deeds, book 395, page 330, in which the same premises were released as in the deed of Richardson to Goodell, excepting that in the side toward the pond the boundary was "by the mill pond belonging to Samuel S. Richardson." The description in this deed was as follows: "All our right, title interest and estate in and to a certain piece of land situated in the southerly part of said — Woburn — containing one acre and seven poles more or less and bounded as follows, to wit — westerly by a street laid out on the easterly side of the Boston and Lowell Railroad ten rods; northerly by the Mill Pond belonging to Samuel S. Richardson twelve rods and eighteen links; easterly by said Mill Pond fifteen rods and nine links; southerly nine rods and twenty one links by land of said Richardson and six rods by land of Daniel Smith, with all the privileges mentioned in a deed given by said Samuel S. Richardson to said Goodell this day and subject to all the restrictions and reservations therein mentioned."

Subsequently to August 11, 1840, the president, directors

and company of the Charlestown Bank foreclosed the mortgages by entry and three years' possession thereunder.

The petitioner derived his title by mesne conveyances from the Charlestown Bank made subsequently to the foreclosures, and held also a record title from Richardson's assignee in bankruptcy.

Goodell, by deed dated May 3, 1842, conveyed to Sumner Flagg the premises described in the deed of Samuel S. Richardson to him. Goodell died intestate in 1891, leaving one Nellie E. Buell as his only heir, and all the real estate, if any, which passed to Goodell under the deed from the president, directors and company of the Charlestown Bank and others, which was not included in the deed from Richardson to Goodell, came by descent to said Buell and was by her conveyed to the respondent.

The respondent asked the judge for the following rulings:

"1. The deed from the Charlestown Bank and others to Goodell conveyed all the interest of the grantors in the fee of the mill pond to the thread of the natural stream of the brook running from Wedge Pond, and to the thread of the natural stream of the Aberjona River.

"2. The foreclosure of the mortgages held by the Charlestown Bank enured to the benefit of Goodell, so far as he was then interested in the mortgaged premises.

"3. The foreclosure of the mortgages held by the Charlestown Bank at the time of said conveyances to Goodell vested an absolute title in Goodell of all the real estate which passed under said deed from the Charlestown Bank and others in excess of that which passed under the deed from Richardson to Goodell."

The respondent contended that such rulings, if given, would show that the petitioner had no record title to the premises sought to be registered. The judge refused to make any of the rulings requested, and ruled instead as follows: "In this case I rule that there was released by deed of the president, directors and company of the Charlestown Bank and others to Goodell, dated August 11, 1840, the right, title, interest and estate of the grantors as mortgagees in and to the same, and only the same, land as that described in the deed from Samuel S. Richardson to

said Goodell, dated August 11, 1840, of the mortgagor's equity of redemption under said mortgages. This ruling renders it unnecessary to consider the matter of adverse possession, or further record title." He thereupon ordered a decree for the petitioner; and the respondent alleged exceptions.

A. C. Vinton, for the respondent.

C. F. Jenney, for the petitioner, was not called upon.

MORTON, J. The judge of the Land Court ruled that the deed from the bank to Goodell released only such title as the bank had in and to the same land and only the same land as that described in Richardson's deed of the same date to Goodell, and that that ruling rendered it "unnecessary to consider the matter of adverse possession, or further record title." The effect of the ruling was to establish the edge of the mill pond as claimed by the petitioner, instead of the thread of the stream as claimed by the respondent, as one of the boundaries of the land described in the bank's deed. The only question before us is the correctness of the ruling so made. We think that it was right.

Although executed by different parties the two deeds could well have been found to have constituted parts of one transaction and to have been made pursuant to a common understanding and arrangement on the part of all persons interested. They bear the same date and were executed and acknowledged on the same day, and were recorded on the same day as that on which they were executed and acknowledged, in the same book, on consecutive pages. Moreover one was a conveyance of the equity of redemption in the premises described in the deed, and the other was a release by the bank of its mortgage. The presumption would be very strong that the release, being a partial one, was intended only to cover so much as was conveyed by the mortgagor. But, however that may be, the description in the release from the bank concludes with the words, "with all the privileges mentioned in a deed given by said Samuel S. Richardson to said Goodell this day and subject to all the restrictions and reservations therein mentioned." Not only, as it might be argued, does this tend still further to show that the two deeds were given as parts of one and the same transaction, and that the premises released were intended to be the same as described in the deed from Richardson to Goodell, but when we

turn to that deed to see what are the restrictions and reservations therein mentioned we find that the grantee is given "the privilege of filling up the mill pond on the northerly and easterly sides of the aforementioned premises one rod in width from the lines above described." "The lines above described" are the "edge of my mill pond," and "the edge of said mill pond," and the privilege thus granted, which is by reference incorporated into the release from the bank, is entirely inconsistent with a construction of that instrument which would carry the boundaries on the mill pond to the thread of the stream.

What the result would be if the release stood alone, and without any reference to the deed from Richardson to Goodell or to the restrictions and reservations therein contained, we need not consider.

Exceptions overruled.

COMMONWEALTH vs. FERDENANDO RADOCCHIA.

Middlesex. January 17, 1910. — May 16, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY,
SHELDON, & RUGG, JJ.

Intoxicating Liquors. Carrier.

It seems, that in St. 1906, c. 421, § 1, which provides that "No person or corporation, except a railroad or street railway corporation, shall, for hire or reward, transport spirituous or intoxicating liquors into or in a city or town in which licenses of the first five classes for the sale of intoxicating liquors are not granted, without first being granted a permit so to do" as thereafter provided, there is nothing which forbids a liquor dealer licensed and doing business in a city where licenses of all classes are granted from delivering, without any charge for transportation, to his customers in another city or town in which licenses of the first five classes are not granted the goods which he lawfully has sold to them, if he does this in good faith without receiving directly or indirectly in the price of the goods any hire or reward for their carriage, and, if he is prosecuted for an alleged violation of the statute, it is a question for the jury whether he has received in the price of the liquor sold any hire or reward for its carriage.

St. 1906, c. 421, § 1, provides as follows: "No person or corporation, except a railroad or street railway corporation, shall, for hire or reward, transport spirituous or intoxicating liquors into or in a city or town in which licenses of the first five classes for the sale of intoxicating liquors are not granted, without first being granted a permit so to do as hereinafter provided." At the trial of a complaint under this statute it appeared that the defendant was the servant of a licensed

liquor dealer in a city where licenses of all classes were granted and was transporting intoxicating liquor for delivery in a city where licenses of the first five classes were not granted, and that the defendant did not have a permit granted under the statute. It further appeared that the defendant's employer agreed to deliver all goods free of charge in the city where the defendant was making the delivery, that the tag on the package containing the liquor was marked "Paid" with the purchaser's name and that at the top was written "No charge made for delivery." The defendant received regular wages for performing all his duties, which included the delivery of intoxicating liquors in the city where this delivery was being made and also included work about his employer's place of business in the city where licenses of all classes were granted and the delivery of intoxicating liquors in various parts of that city. *Held*, that the wages paid to the defendant for all the services rendered by him to his employer could not be said as matter of law to be a hire or reward for the carriage of the liquors into the city where licenses of the first five classes were not granted merely because those services incidentally included the transportation and delivery of liquors to their purchasers in such city, and that the question whether the defendant had violated the statute was for the jury. What rule would be applied in a case where it appeared that the servant was hired or paid exclusively or even principally for the purpose of making such deliveries was not considered.

COMPLAINT received and sworn to in the First District Court of Eastern Middlesex on September 13, 1909, under St. 1906, c. 421, § 1, charging the defendant with the illegal transportation of liquor into the city of Malden on September 11, 1909.

At the trial in the Superior Court before *Morton, J.*, it was agreed that the city of Malden was a city in which licenses of the first five classes for the sale of intoxicating liquors were not granted, within the meaning of St. 1906, c. 421, § 1.

The defendant was the employee of one Marotto, a licensed liquor dealer in the city of Boston. As a part of the defendant's duties while in the employ of Marotto he was required to deliver liquor in the city of Malden, using a team owned by Marotto to carry the liquor. His other duties were to work about Marotto's place of business in Boston and to drive a team of Marotto, delivering liquor in various parts of Boston. The defendant received regular weekly wages from Marotto for performing all of his duties, including the delivery of liquor into the city of Malden.

Marotto had a sign in his store in Boston which said substantially, "All goods delivered free to Malden." The tags upon the cases and barrels of liquor were marked "Paid" with the consignee's name, and at the top was written "No charge made for delivery."

At the time of seizure, the defendant was conveying liquor under above conditions in the city of Malden. It was agreed that the defendant did not have a permit granted under St. 1906, c. 421.

The judge instructed the jury in part, as follows: "There is no dispute in this case that the defendant was hired by one Marotto and paid wages by said Marotto. His duties have been described to you, and as a part of them he delivered goods into the city of Malden. I instruct you then, as a matter of law, that if you find this to be so, then the receiving of wages from Marotto would be hire and reward for the transportation of liquors into the city of Malden."

The jury returned a verdict of guilty; and the defendant alleged exceptions to the instruction given by the judge in the portion of his charge quoted above.

The case was submitted on briefs at the sitting of the court in January, 1910, and afterwards was submitted on briefs to all the justices.

S. Parsons, H. A. Bowen & E. C. Jacobs, for the defendant.

J. J. Higgins, District Attorney, for the Commonwealth.

SHELDON, J. In the opinion of the majority of the court the instructions to the jury cannot be sustained. The provision of the statute is that "no person or corporation, except a railroad or street railway corporation, shall, for hire or reward, transport spirituous or intoxicating liquors into or in a city or town in which licenses of the first five classes for the sale of intoxicating liquors are not granted, without first being granted a permit so to do as hereinafter provided." This plainly means hire or reward to be given to the carrier for the carriage.

If the seller himself delivers the goods, he may be convicted under the statute if he receives such hire or reward for the carriage. If he agrees to deliver the goods free of charge for the carriage, it doubtless will be a question for the jury whether this is actually done, or whether he really receives a hire or reward for the carriage by its being included in the price charged for the liquors themselves; but there is nothing in this statute which forbids him from delivering to his customers in another town the goods which he has sold to them, if he really in good faith does this without receiving, either directly

or indirectly in the price of the goods, any hire or reward for the carriage. It will always be for the jury, even though the price charged for the liquors is not made different for different distances, to say whether that price does not really include a charge for delivery, based perhaps upon what is expected to be the average cost of all the deliveries that will be made.

Whatever the seller may do himself he may do through his hired servant. In such a case the wages paid to that servant for all the services to be rendered by the latter cannot be said to be a hire or reward for the carriage of liquors, merely because those services may incidentally include the duty of carrying the liquors and delivering them to the purchasers thereof. We need not consider how this would be if it appeared that the servant was hired and paid exclusively or even principally for the purpose of making such deliveries. See *Commonwealth v. Intoxicating Liquors*, 172 Mass. 311, 315, 316.

It is to be presumed, as has been suggested by the district attorney, that full instructions were given to the jury on all other points; but that cannot cure the error in the instruction that was given.

Exceptions sustained.

JOSEPH WEEKS vs. SARAH L. BROOKS & others.

Suffolk. January 24, 1910. — May 16, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Land Court, Appeal. Superior Court. Constitutional Law, Right to trial by jury.

Upon a petition in the Land Court for registration of title, after a decree for the petitioner has been entered in that court and the respondent has claimed an appeal to the Superior Court under St. 1904, c. 448, § 8, if the issues presented by the respondent for trial in the Superior Court are disallowed by the judge of the Land Court, the appeal has not been perfected and the Superior Court has not acquired jurisdiction, so that a motion in the Superior Court for the framing of issues must be denied and a motion in that court to dismiss the appeal must be granted.

Where the title to real property is put in issue in a proceeding at law, a trial by jury is not a privilege to be granted in the sound discretion of the court, as it is in the case of a probate appeal or of issues in a suit in equity, but is a right guaranteed by the Constitution.

If, at the trial in the Land Court of a petition for registration of the title to certain land, the boundaries of the land as described in the deeds conveying it cannot be ascertained without extrinsic evidence both documentary and oral, and the petitioner puts in such extrinsic evidence in support of his contention, the respondent by leaving this evidence uncontradicted does not lose his right to have the issues of fact presented to a jury, and, if upon the evidence of the petitioner the trial judge gives a judgment for the petitioner, from which the respondent appeals to the Superior Court and presents issues relating to the boundaries for trial before a jury in the Superior Court, and the judge of the Land Court disallows the issues on the ground that no questions of fact are involved, the respondent is aggrieved by such ruling and decision, which violate his constitutional right to have the issues of fact submitted to a jury, and exceptions alleged by him will be sustained.

Where, on an appeal to the Superior Court from a decree of the Land Court under St. 1904, c. 448, § 8, the appellant presents issues of fact for trial before a jury in the Superior Court, and the judge of the Land Court certifies that the issues presented are framed in the form requested, but that they are disallowed by him as presenting only questions of law, and the appellant alleges exceptions to the order disallowing the issues, upon a subsequent decision by this court sustaining the exceptions on the ground that the order of the judge disallowing the issues was erroneous, the appellant does not lose his right of appeal to the Superior Court because the prosecution of his exceptions has extended the time of the final certification of the issues beyond thirty days from the date of the order appealed from, as limited by § 8, and the issues are to be remanded to the Land Court for certification and transmission to the Superior Court as they were framed and certified, and as of the date of that certification, with the certificate of the erroneous disallowance omitted.

PETITION, filed in the Land Court on May 27, 1909, for the registration of the title to a parcel of land with the buildings thereon on the northerly side of Beacon Street between Raleigh Street and Deerfield Street in Boston.

In the Land Court the case was heard by *Davis, J.* It appeared that the petitioner owned the premises, the title to which he sought to have registered, and the only question was whether the premises were subject to the restrictions imposed by a certain indenture. The indenture was introduced in evidence. There was no mention of the restrictions in the deeds under which the petitioner claimed title. The petitioner introduced documentary and oral evidence, which is referred to in the opinion. The respondents offered no evidence. The judge made a decision in favor of the petitioner, and ruled that the restrictions imposed by the indenture did not apply to the land of the petitioner covered by his application for registration of title. The respondents excepted to the ruling.

Within thirty days after the filing of the decision some of the

respondents claimed an appeal to the Superior Court, and moved in the Land Court that the following issues be framed for a trial by jury in the Superior Court :

“(1) Is the junction of Commonwealth Avenue and Beacon Street, referred to in an agreement signed by Charles Francis Adams and others dated May 16, 1890, and recorded with Suffolk Deeds, Book 2039, page 469, east of the westerly line of the petitioner's land ?

“(2) If the junction of Commonwealth Avenue and Beacon Street aforesaid is east of the westerly line of the petitioner's land, where is said junction ?”

After a hearing upon this motion, the judge of the Land Court indorsed upon the issues so requested by the appealing respondents, together with the date and his signature, the following: “Framed as above, but disallowed as presenting a question of law and not matter for a jury trial on the facts as to which the respondents are parties aggrieved by the decision of this court, from which this appeal is sought.”

To this order disallowing the issues the appealing respondents alleged exceptions.

The appeal came on to be heard in the Superior Court before *Fessenden, J.*, upon two motions, one a motion of the appealing respondents for the framing of issues by the Superior Court for a trial by jury and the other a motion of the petitioner that the appeal be dismissed.

At the hearing upon the two motions, it was agreed that a bill of exceptions had been filed in the Land Court to the ruling of that court disallowing the issues. Thereupon, being of opinion that the questions raised by the motions in the Superior Court should be heard and determined by the Supreme Judicial Court at the same time with the questions raised by the bill of exceptions from the Land Court, the judge ruled *pro forma* that the appellants' motion for the framing and allowance of issues by the Superior Court should be denied and that the motion of the appellee for the dismissal of this appeal should be allowed, and reported the case to this court, such disposition to be made of the two motions as to this court might seem proper.

It was agreed by the parties that the bill of exceptions from the Land Court should be presented to this court and argued at

the same time with the report from the Superior Court and that the bill of exceptions set forth, so far as material, the contents of the papers of which certified copies had been filed in the Superior Court.

The case was argued at the bar in January, 1910, before Knowlton, C. J., Hammond, Braley, Sheldon, & Rugg, JJ., and afterwards was submitted on briefs to all the justices.

R. G. Dodge, (*C. W. Blood* with him,) for the respondents.

F. Rackemann, (*F. Brewster* with him,) for the petitioner.

BRALEY, J. By St. of 1904, c. 448, § 8, in proceedings for registration of title, a party who is aggrieved by a finding of fact can have a jury trial on appeal to the Superior Court. After an appeal has been duly claimed of record, the issues are to be framed by the Land Court, and copies of all material papers must be filed in the appellate court by the appellant within the time prescribed by the statute. *Luce v. Parsons*, 192 Mass. 8. *Foss v. Atkins*, 193 Mass. 486, 487. *Dunbar v. Kronmuller*, 198 Mass. 521. By St. of 1905, c. 288, the judge is also required within thirty days after the entry of the appeal to transmit a full report of his decision so far as material to the questions involved, which by analogy to an auditor's report is made *prima facie* evidence.

But, if after a decree for registration has been ordered an appeal lies for a jury trial on the facts, there is no record to transmit until the issues have been framed and allowed. If the appeal is perfected, the Superior Court may modify or enlarge the issues sent up, or prepare additional issues where such a course becomes necessary for an intelligent trial of the controversy. *Luce v. Parsons*, 192 Mass. 8, 11, 12. The respondents duly claimed an appeal, but after issues had been framed they were disallowed, and for want of this precedent condition the appeal not having been perfected, the Superior Court never acquired jurisdiction. It follows that the orders denying the motion to frame issues in that court, and granting the motion to dismiss, were right.

But if the judge, when properly requested by the defeated party, decides that no questions of fact are involved and for this reason declines to frame issues, or to allow issues after he has framed them, his decision may be reviewed by this court upon

exceptions or report. R. L. c. 128, § 13. St. 1904, c. 448, § 8. *Dunbar v. Kronmuller*, 198 Mass. 521.

We assume from the recitals in the record that the respondents who prosecute the exceptions were not strangers, but were properly before the court as parties under R. L. c. 128, §§ 30, 33, and that the only ground upon which the judge went is shown by his indorsement, that in view of his decision as to the title the issues presented no questions of fact.

In the delimitation of the petitioner's land, it became necessary to determine the exact location of the open area designated as the "junction" of the public ways described in the agreement, upon which rest the rights of the respondents to enforce the restrictions created by the instrument. It is settled that, where in an attempt to locate land according to the description given in a deed or other instrument uncertainty arises, evidence of extrinsic facts is relevant to ascertain the intention of the parties. A disputed boundary, or the condition of the locality at the time of the conveyance, are familiar illustrations of the rule. *Putnam v. Bond*, 100 Mass. 58. *Hathaway v. Evans*, 113 Mass. 264. *Hoar v. Goulding*, 116 Mass. 132. *Dunham v. Gannett*, 124 Mass. 151. *Barrett v. Murphy*, 140 Mass. 133. *Haskell v. Friend*, 196 Mass. 198. *Gould v. Wagner*, 196 Mass. 270. The streets as shown by the chalk and compilation plan do not cross at right angles, but open into each other so that the side lines join at different points, while the centre lines, when projected, apparently intersect at various other points; and there is no common point of intersection. If the lines of intersection are established at one point, the petitioner's land is unincumbered, but if located as the respondents contend, a portion of the premises is within the restricted space. To determine that question the physical conditions existing at the date of the agreement would have to be ascertained. In view of subsequent changes caused by the public authorities in taking land for widening both streets, and the outside avenue opening into the junction, the inquiry had been complicated and became more difficult of solution. But even the petitioner does not contend that with nothing more than the agreement in hand the judge upon taking a view could have ascertained the limits of the locality and awarded judgment, for the description without extrinsic aid could

not be intelligently and accurately applied. Obviously documentary and oral evidence was not only admissible but necessary to locate and define the original boundaries. *Hoar v. Goulding*, 116 Mass. 132. *Macdonald v. Morrill*, 154 Mass. 270. *Graves v. Broughton*, 185 Mass. 174. *First National Bank of Woburn v. Woburn*, 192 Mass. 220. *De Ponta v. Driscoll*, 200 Mass. 225. It appears that the petitioner introduced considerable evidence in support of his contention of a clear title, but the respondents offered no testimony.

A jury trial, however, where the title to real property is put in issue, is not a privilege to be granted in the sound discretion of the court as in probate appeals, or issues in suits in equity, but is a right guaranteed by the Constitution. In the lawful exercise of this right the respondents were not required to offer any evidence in the court below, but could reserve their testimony for presentation at the trial of the appeal, or even there might take the verdict of the jury upon the case as made out by the petitioner. *Mead v. Cutler*, 194 Mass. 277. If in view of the uncontradicted extrinsic evidence the judge was of opinion, and decided, that the petitioner should prevail, the respondents were not precluded from their appeal, even if it was undisputed that the compilation plan correctly indicated the original lines of the streets with the subsequent alterations. The construction of the agreement was for the court when read in the light of the evidence, but its application to the land was a question of fact resting upon inferences to be drawn from all the testimony. *Boston v. Richardson*, 105 Mass. 351, 358. *Smith v. Vose & Sons Piano Co.* 194 Mass. 193, 200. *Derby Desk Co. v. Connors Brothers Construction Co.* 204 Mass. 461.

The issues framed aptly presented the questions of fact to be decided, and which were decided by the judge before he could determine whether the premises were either wholly or partially within the original area. By the decision, the respondents were aggrieved, and, having regularly availed themselves of the provisions of the statute, were entitled to have the questions submitted to a jury.

Nor has this right been lost or annulled, as the petitioner suggests, by the lapse of time occasioned in the prosecution of the

exceptions. If, the issues having been disallowed, the proceedings could not properly be certified by the recorder, the reversal of the order leaves them for certification and transmission as framed, with the indorsement of disallowance omitted. *Dunbar v. Kronmuller*, 198 Mass. 521.

It is unnecessary to consider the remaining exceptions as they are waived by the respondents, if a jury trial is granted.

The orders made by the Superior Court, therefore, must be affirmed, and the exceptions taken in the Land Court must be sustained.

So ordered.

COMMONWEALTH vs. NAPOLEON J. RIVET.

Middlesex. March 7, 1910. — May 16, 1910.

Present : KNOWLTON, C. J., MORTON, LORING, BRALEY, & RUGG, JJ.

Homicide. Evidence, Of motive, Competent for limited purpose, Of habits and character, Remoteness. Practice, Criminal, Exceptions.

At the trial of an indictment for murder, where the motive for the commission of the crime relied on by the Commonwealth is the collection by the defendant of the amount named in a policy of insurance upon the life of the deceased, which was held by the defendant as security for a debt owed to him by the deceased, the Commonwealth may show that the defendant understood what a life insurance policy meant, and for that purpose may introduce evidence, which otherwise would be incompetent, that in the year before the alleged murder the defendant had made an application to a beneficiary organization of which he was a member for sick benefits during ten weeks.

In a criminal case where the Commonwealth, for the purpose of showing a motive of the defendant for the commission of the crime, introduces evidence which except to show such motive would be incompetent, if the defendant wishes to have the jury instructed that the evidence is competent only for the limited purpose for which it has been admitted, he must ask for such an instruction. If he fails to do so, he afterwards cannot complain because no such instruction limiting the effect of the evidence was given.

At the trial of an indictment for murder, where the defendant's counsel disclaims having any evidence that the defendant knew of the character of the deceased and also disclaims offering evidence to show that the killing was done in self defense, it is proper to exclude evidence offered by the defendant to show that the habits and character of the deceased were such that he would be likely to have come to his death by having got into a fight when drunk.

In a criminal case, as in a civil one, the fact that a person did an act cannot be proved by evidence that his habits were such that he would have been likely to

do it, and this rule applies to evidence offered by a defendant as much as to evidence offered by the prosecution.

At the trial of an indictment for murder it appeared that the defendant passed the night of the day when the deceased was killed at the house of the defendant's brother in law, that the next morning as the family were about to sit down to breakfast a neighbor came in and told them that the deceased had been killed and that his body was at the undertaker's, that the brother in law said, "Let us go and see him," and that the brother in law's wife said, "It is better to have breakfast and go to church; it is too late." It also appeared that there was one church service at 8.30 A. M. and another at 10.30 A. M. and that the defendant attended the service at 8.30 A. M. The defendant offered evidence that the seats at the 8.30 service were free while the 10.30 service was "for those who had seats or pews." The evidence was excluded against the exception of the defendant. In answer to an inquiry of the presiding judges the defendant's counsel stated that he did not contend that the fact that the seats were free at the 8.30 service was given by the defendant as a reason why he "did not go with the others to see the body immediately instead of going to church." *Held*, that under the circumstances the evidence was excluded properly as too remote.

INDICTMENT, found and returned on June 5, 1908, charging the defendant with murdering one Joseph Gailloux at Lowell on February 29, 1908.

In the Superior Court the defendant was tried before *Harris* and *Hitchcock*, JJ. The jury returned a verdict of guilty of murder in the first degree; and the defendant alleged exceptions, raising the questions which are stated in the opinion as well as others which were waived or were not argued by the defendant.

W. H. Bent, for the defendant.

J. J. Higgins, District Attorney, for the Commonwealth.

LORING, J. 1. Had there been no question as to the comprehension by this defendant of what a life insurance policy is, the evidence that he had made an application to a beneficiary organization of which he was a member for sick benefits for ten weeks during January, February, March and April, 1907, would not have been competent. The motive relied on by the Commonwealth was the intention to collect the amount of the policy on the life of the deceased, pledged to the defendant as security for a debt owed to him by the deceased. If the defendant in fact did not know what a life policy was and what rights he had as pledgee of the policy on the life of the deceased, the Commonwealth had not made out its case so far as the motive relied upon by it was concerned. We cannot say that there was error

in allowing the district attorney to prove that this defendant, who seems to have been a foreigner, understood what a life insurance policy means. The burden is on the excepting party to show error. *Jones v. Smith*, 121 Mass. 15.

If the defendant had wished to have the jury instructed that the evidence was admissible only for the limited purpose for which it was competent, he should have asked for such an instruction. *Howe v. Ray*, 113 Mass. 88.

2. Two exceptions to the exclusion of evidence have been argued together. One of these was to the exclusion of evidence that on one occasion, late in the autumn previous to the murder, the deceased had been found in Daigle's shop, late at night, dead drunk. The other exception was to the exclusion of evidence that the deceased was frequently in fights when he was intoxicated; that he was frequently seen with his face all battered up in some contest he had had, and that he had been seen within a year before his death "with a swollen face, black eyes [and] battered face generally."

On inquiry the defendant's counsel disclaimed having evidence that the defendant knew of the character of the deceased. He also disclaimed offering this evidence to show that the killing here in question was done in self defense. The case therefore does not come within *Commonwealth v. Tircinski*, 189 Mass. 257.

The defendant's argument in support of this exception is that this was evidence from which the jury could infer that the deceased came to his death by having got into a fight when drunk. The fact that a person's habits or character are such that he would be apt to do an act is not competent evidence that he did the act. Nothing is better settled than that. *Commonwealth v. Worcester*, 3 Pick. 461. *Ellis v. Short*, 21 Pick. 142. *Tenney v. Tuttle*, 1 Allen, 185. *Heland v. Lowell*, 3 Allen, 407. *McCarty v. Leary*, 118 Mass. 509. *Menard v. Boston & Maine Railroad*, 150 Mass. 386. *Geary v. Stevenson*, 169 Mass. 23. *Edwards v. Worcester*, 172 Mass. 104. *The King v. Fisher*, [1910] 1 K. B. 149.

There is no difference between the usual case where evidence of this character is offered by the prosecution to prove that the defendant did the act he is charged with doing and the case at bar where evidence was offered by the defendant to prove that

the deceased did the act in question and thereby to show that the defendant did not do it. Doing an act cannot be proved in either base by evidence that from the habits of the person in question he would be apt to do it.

3. The defendant passed the night in question at the house of his brother in law. There was evidence that as they were about to sit down to breakfast the next morning a neighbor came in and told them that Gailloux had been killed and that his body was at the undertaker's; and that the brother in law said, "Let us go and see him," and the brother in law's wife said, "It is better to have breakfast and go to church; it is too late." It also appeared that there was one church service at 8.30 and another at 10.30 A. M. and that the defendant attended the service at 8.30 A. M. The defendant took an exception to the exclusion of evidence that seats at the 8.30 service were free while the 10.30 service was "for those who had seats or pews." On inquiry the defendant's counsel stated that he did not contend that this was given by him (Rivet) as a reason "why Rivet did not go with the others to see the body immediately instead of going to church." Under those circumstances the evidence was too remote.

We have read all the cases cited by the defendant and find nothing in them that helps him here.

4. The other exceptions were either expressly waived or were not argued, and for that reason we treat them as waived. We desire to add, however, that we have examined them and that we find no error.

The entry must be

Exceptions overruled.

JOHN N. BUNNELL vs. CHARLES F. HIXON, executor & others.

Worcester. March 22, 1910. — May 16, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Husband and Wife. Will. Statute.

History of legislation in this Commonwealth concerning the testamentary power of married women, recounted by BRALEY, J.

Although the will of a married woman takes effect only at the time of her death, the consent in writing to such a will executed by the husband of the testatrix waives only such rights as were given by statutes in existence when he signed the consent, and does not waive different rights given to him by subsequent statutes, which are in force at the time of his wife's death.

A married woman died testate in 1908 and her will was allowed in that year. It was executed on October 30, 1901, and on that day her husband executed at the end of it his assent in writing to the will. The will contained no devise or legacy to him or for his benefit. No child was born of the marriage. When the will was executed, the provisions of St. 1900, c. 450, §§ 5-7, had not been repealed, but they were repealed before they went into effect by the Revised Laws, which went into effect from and after December 31, 1901, so that the provisions of Pub. Sta. c. 147, § 6, as amended by Sts. 1884, c. 301, 1885, c. 255, and 1887, c. 290, were in force. At the time of the death of the testatrix the provisions of R. L. c. 135, §§ 1-16 and c. 140, § 3, cl. 3, were in force, which give a surviving husband a right to waive the provisions of his wife's will and to claim such portions of her estate as he would have taken if she had died intestate, and also give him a larger interest in the real and personal property of his deceased wife than was given by the statutes in force when the will was executed or by those which were repealed by the Revised Laws. *Held*, that the effect of the consent in writing by the husband to the will of his wife in October, 1901, was to waive his statutory rights as they existed at that time and that he had not waived the different rights given him by later statutes, so that at the time of his wife's death she had not the testamentary power to deprive him of the right to claim and to receive the same share or interest which he would have taken if she had died intestate.

PETITION, filed in the Probate Court for the County of Worcester on August 17, 1909, by the conservator of the property of John N. Bunnell, for and in the name of said Bunnell who was the husband of Harriet S. Bunnell, who died testate on June 11, 1908, and whose will was allowed on June 30, 1908, alleging that the petitioner had waived the provisions of the will of his late wife as permitted by statute, and that there was a balance of the estate of his late wife in the hands of the executor of her will, and praying that a partial distribution of such balance might be decreed to be made among such persons as might be entitled thereto.

The following stipulation was signed by the respective counsel for the petitioner and the executor and was filed in the Probate Court:

"In the matter of the above named petition, it is stipulated and agreed as follows:

"1. That a partial distribution of the personal property of said estate can be now made without detriment thereto, and without endangering the rights of any creditors;

"2. That the only question raised is whether or not the petitioner, John N. Bunnell, is entitled to any interest or share in his wife's estate, he having signed his written consent to her will at the time of its execution, although he has duly waived any provisions that had been made in said will for him, and claimed such portion of her estate as he would have taken if she had died intestate, as is provided in R. L. c. 185, § 16;

"3. That if it shall be found that having filed said waiver and claim, he is entitled to the portion of her estate provided in said section, the court may order a partial distribution to be made of \$5,000 on account of the distributive share of said John N. Bunnell in said estate."

The will of Harriet S. Bunnell was executed on October 30, 1901. It contained no devise or legacy to her husband or for his benefit. At the end of the will was written the consent of her husband, signed by him, and attested by the same three witnesses who attested the signature of the testatrix. This consent was as follows: "I John N. Bunnell husband of Harriet S. Bunnell hereby consent to the foregoing will."

In the Probate Court *Forbes, J.*, made a decree that there should be a partial distribution as prayed for in the petition and that the executor of the will of Harriet S. Bunnell should pay to John N. Bunnell, her husband, the sum of \$5,000. The executor of the will of Harriet S. Bunnell and other respondents interested in her estate as heirs at law and beneficiaries under her will appealed from the decree.

The appeal was heard in the Supreme Judicial Court by *Loring, J.*, who made a final decree affirming the decree of the Probate Court and remanding the case to the Probate Court for further proceedings. The respondents appealed.

The case was submitted on briefs.

J. E. Sullivan & D. F. O'Connell, for the respondents.

W. Williams & S. D. Vincent, for the petitioner.

BRALEY, J. By the common law, unless acting under a power of appointment, a married woman could not make a valid will devising real property, although with her husband's assent she could make a bequest of her personal estate to strangers. *Nolin v. Pearson*, 191 Mass. 283, 284. The St. of 1842, c. 74, however, modified the common law, enabling her, if the written consent of her husband was indorsed thereon, to make a testamentary disposition of any property held in her own right, "provided, that the rights and interests of the husband to and in any such property shall in no way be affected thereby," but gave to her the power of revocation which she could exercise at her pleasure. But a majority of the court having held in *Morse v. Thompson*, 4 Cush. 562, that under the statute she could not devise her real estate to him, the St. of 1850, c. 200, was passed, permitting married women to devise and bequeath their separate estates to their husbands. The St. of 1855, c. 304, § 5, and St. of 1857, c. 249, § 4, followed, which further enlarged the right, until by the Gen. Sts. c. 108, § 9, she could make a will as if sole, but unless her husband consented in writing, the testatrix could not deprive him of more than one half of her personal estate. The Pub. Sts. c. 147, § 6, while re-enacting this provision, enlarged the limitation by preserving the rights of the husband as tenant by the curtesy. In pursuance of a public policy which has constantly tended to abrogate the doctrine of the unity in person of husband and wife, the Sts. of 1884, c. 301, 1885, c. 255, and 1887, c. 290, were enacted, which materially amended Pub. Sts. c. 147, § 6, by conferring upon a married woman the power, after a decree had been entered that she had been deserted by her husband, or was living apart from him for justifiable cause, to dispose by will of all her property with the same effect as if unmarried. The amendatory acts, however, increased the husband's rights by providing that if no issue were born of the marriage, he should hold for life, "the use of one half of her real estate," or her real estate not exceeding \$5,000 in value, where no issue survived her. The Sts. of 1899, c. 479, and of 1900, c. 450, revising the laws relating to the distribution of the estates of deceased persons, and the rights

therein of surviving husbands and widows, and repealing Pub. Sts. c. 147, § 6, as amended, never became operative. The period when the second statute, which repealed the first statute while re-enacting its provisions, was to become effective had not expired on December 31, 1901,* from and after which the Revised Laws took effect and expressly repealed the act. St. 1901, c. 461. R. L. c. 226, § 1; c. 227. *Shelton v. Sears*, 187 Mass. 455.

In accordance with the statutes then in force, the testatrix on October 30, 1901, executed, and published her will disposing of both real and personal property, to which her husband gave his written consent indorsed upon the instrument. No children appear to have been born of the marriage, and by its provisions he is deprived of any share in the distribution of his wife's estate. But at the death of the testatrix on June 11, 1908, a further and radical change had been wrought in the rights of a surviving husband in the property of a deceased wife where she died testate. By R. L. c. 135, § 1, a married woman, if of full age and sound mind, can make a will with the same effect as if the marital relation did not exist, and by § 16, where no decree in her favor for separation has been entered under R. L. c. 153, § 36, the surviving husband within one year after probate may waive the will and claim such portions of the estate as he would have taken if she had died intestate. The legislative purpose was to confer upon the surviving husband, not only a new, but an equal right with the surviving widow, to waive the will of the deceased spouse and participate in the distribution of the estate as a statutory heir. The validity of the will of the testatrix was not dependent upon the husband's consent, but his act was only a waiver of his statutory rights as they then existed. *Kelley v. Snow*, 185 Mass. 288, 302. Before the will took effect the statute was repealed, and under R. L. c. 140, § 3, cl. 3, he became entitled, if she died

* St. 1900, c. 450, provided in § 12 that that act, with the exception of one section, should take effect on July 1, 1901. St. 1901, c. 461, extended this time until January 1, 1902. The previous statute, St. 1899, c. 479, provided in § 14 that it should take effect on April 1, 1900. St. 1900, c. 174, extended this time until January 1, 1901, but before that date the act was repealed by St. 1900, c. 450, § 11.

intestate, to a much larger interest in her real and personal property. It therefore was not within her testamentary power at the time of her decease to deprive him of the right by proper proceedings to claim and receive the same share or interest which he would have taken upon intestacy. R. L. c. 135, §§ 4, 16. *Burroughs v. Nutting*, 105 Mass. 228. *Johnson v. Williams*, 152 Mass. 414.

• *Decree of the Probate Court affirmed.*

ELLEN M. MACKIN vs. THOMAS F. DWYER.

Middlesex. November 9, 1909. — May 17, 1910.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Contract, Consideration, Validity. Mistake. Statute of Frauds. Executor and Administrator.

While forbearance from litigating a claim, which is known to the person forbearing to be frivolous or vexatious, is not a good consideration for a promise for the reason that the promotion of such litigation would be or could be found to be either fraudulent or wanting in good faith, yet, short of that, forbearance from litigation is a good consideration for a promise, and it is not necessary in an action upon a promise made for such consideration that it should appear that there was in fact a good cause of action or a fair and reasonable ground of success in the threatened litigation.

At the trial of an action of contract by a sister against her brother to recover a sum of money which the plaintiff alleged that the defendant promised to pay to her if she would not oppose the proof of the will of their father, there was evidence tending to prove the following facts: At his death the father left personal property amounting to about \$300, all of which it was necessary to expend for the payment of taxes, expenses of the last sickness, of the funeral and of the administration of the estate, and real estate worth \$7,300. The father's will nominated the defendant as executor, gave a legacy of \$1,000 each to the plaintiff and her sister, a legacy of \$500 to another son, and by specific devises all of the real estate to the defendant and to his son. Previous to the death of the father he had lived in a tenement, an upper floor of which was occupied by the defendant and his family. Some member of the defendant's family always was present when the plaintiff or others of the children and grandchildren called upon the father. A few months before the father's death he drew \$1,300 from a bank, which he used to pay off a mortgage on the premises specifically devised to the defendant's son. After the issuance of a citation upon a petition of the defendant for proof of the will, there was a family council at which the plaintiff expressed her dissatisfaction with the will and announced her intention of contesting it. The defendant thereupon promised to pay her the \$1,000 given her in the will as a legacy if she would refrain from any contest. The plaintiff

did refrain, relying on the defendant's promise, and the will was proved without objection. *Held*, that it could not be ruled as matter of law that the plaintiff's threat to contest the will was frivolous or vexatious, or that the promise of the defendant was without consideration.

At the trial of an action by a sister against her brother to recover for breach of an agreement by the defendant alleged to have been made in consideration of forbearance on the part of the plaintiff from contesting the will of the father of the plaintiff and of the defendant, one issue was whether in making a threat to contest the will the plaintiff had acted in good faith, and there was evidence tending to show that she had so acted. The defendant asked the presiding judge to instruct the jury that "the plaintiff must have acted in good faith in threatening to contest the will or there is not sufficient consideration to support the promise," but no such instruction was given either in form or in substance, and the defendant alleged exceptions. *Held*, that the exceptions must be sustained, because the substance of the instruction asked for should have been given to the jury in some form.

Where a sister is dissatisfied with the provisions of her father's will and in good faith threatens to contest its proof and allowance but, in consideration of a promise on the part of her brother, who desired the will to be proved, to pay to her the amount of a legacy which was given to her in the will, forbears from contesting the will, the validity of the contract thus made by the brother is not affected by the fact that both the sister and the brother were acting under a mistaken idea as to their respective legal rights and obligations, so long as the brother was fully acquainted with the facts and there was no fraud or misrepresentation.

If a brother, who was named as executor in the will of his father, who had died leaving personal estate which was not more than sufficient to pay the expenses of the last sickness, of the funeral and of the administration of the estate, and real estate all of which was devised specifically to the brother and to his son, before the will is proved promises his sister to pay to her the amount of a general legacy, which was given to her by the provisions of the will, in consideration of her forbearing from carrying out an intention to contest the allowance of the will, which she in good faith had entertained, and thus permitting the allowance of the will and the confirmation of the devises therein to the brother and to his son, such a promise is not within the provision of R. L. c. 74, § 1, cl. 1, that without a memorandum in writing no action shall be brought "to charge an executor . . . upon a special promise to answer damages out of his own estate," both because the promise is made by the brother for his own benefit and is an original and not a collateral undertaking on his part and to permit him to avoid his promise to his sister by relying on the statute of frauds would be to permit him to perpetrate a fraud by means of the statute, and also because, all the real estate having been devised specifically and there having been no personal property sufficient to pay the legacy, there was no estate of the testator out of which a general legacy was payable and consequently there was no debt due to the sister from the estate.

MORTON, J. This is an action of contract in which the plaintiff seeks to recover from the defendant the sum of \$1,000 which the plaintiff alleges he promised to pay her if she would not contest the will of their father, of which he was appointed executor by the testator. There was a verdict for the plaintiff and the

case is here on exceptions by the defendant to the refusal of the presiding judge * to give certain rulings that were requested.

By the will the testator gave legacies of \$1,000 each to the plaintiff and her sister Bridget, and a legacy of \$500 to his son Michael. He also gave to Bridget the household furniture. Certain parcels of real estate of which the testator died seised, being all the real estate of which he was possessed, were specifically devised to the defendant and his son Thomas F. Dwyer, Jr. To his grandson were also given the testator's tools. The real estate was inventoried at \$7,300. The personal property, including \$108 in cash, amounted to a little over \$300, and was all used in the payment of taxes, expenses of the last sickness, administration and the funeral, and of the legacies of the furniture to Bridget and the tools to the grandson; — the result being that there were no assets with which to pay the legacies to the plaintiff and her sister and Michael. The defendant petitioned the Probate Court for the allowance of the will, and a citation was issued of which all parties interested had due notice. There was testimony tending to show that while the petition for probate of the will was pending there was a family council, at which all parties interested, including the defendant, were present, and at which the plaintiff expressed dissatisfaction with the will and announced her intention of contesting it; and that the defendant thereupon promised to pay her the \$1,000 given her in the will as a legacy if she would refrain from any contest, which she did, relying upon the promise thus made, and the will was duly proved and allowed without any objection being made thereto. There was also testimony tending to show that the defendant and his family had lived in an upper tenement in the same house with his father for many years, and that either his daughter Bridget, who kept house for their father, or some one of the defendant's family was always present when the plaintiff or others of the children or grandchildren called upon him. It further appeared that a few months before he died the testator drew out of the bank \$1,300, which he used to pay off a mortgage on premises specifically devised to the defendant's son.

We do not deem it necessary to recite the rulings requested or to consider them *seriatim*. The defendant contends in sub-

* Hardy, J.

stance that there was no consideration for the promise ; that in order to constitute a sufficient consideration it must appear that there was reasonable ground for contesting the will, and that the plaintiff was acting in good faith in proposing to contest it ; that the promise was made under a mutual mistake as to the liability of the defendant for the legacy ; and lastly that the promise, being oral, is within that provision of the statute of frauds which declares that no action shall be brought "To charge an executor or administrator . . . upon a special promise to answer damages out of his own estate." R. L. c. 74, § 1, cl. 1.

It is settled in this Commonwealth that forbearance to sue constitutes or may be found to constitute a good consideration for a promise to an intending litigant, and that it is not necessary in an action on such promise that it should appear that there was in fact a good cause of action, or a fair and reasonable ground of success in the threatened suit. Forbearance to sue a claim known to be frivolous or vexatious would not be a good consideration for the reason that the promotion of such a suit would be or could be found to be either fraudulent or wanting in good faith. But short of that, forbearance to sue would seem to be a good consideration for a promise founded thereon. *Blount v. Wheeler*, 199 Mass. 330. *Kennedy v. Welch*, 196 Mass. 592. *Prout v. Pittsfield Fire District*, 154 Mass. 450. *Wilton v. Eaton*, 127 Mass. 174. *Kerr v. Lucas*, 1 Allen, 279. In the present case the circumstances under which the will was made were such that it could not be ruled as matter of law that the threat to contest it was frivolous or vexatious. *Blount v. Wheeler*, *supra*.

In regard to the matter of good faith, the defendant asked the presiding judge to instruct the jury that "the plaintiff must have acted in good faith in threatening to contest [the] will or there is not sufficient consideration to support the promise." This instruction was not given in form or substance. The judge did instruct the jury that if they found that the plaintiff said she was going to oppose the probate of the will and the defendant had reason to suppose that she was going to do so, then it was not essential for them to go into the question whether she was acting in good faith on reasonable grounds. And this was correct as far as it went. But the judge did not instruct the jury,

as he should have done in some form, that in order that forbearance to sue should constitute a valid consideration for the defendant's promise there must have been a *bona fide* intention on the part of the plaintiff to contest the will if her legacy was not paid, and that a threat to contest the will, merely for the purpose of compelling the defendant to settle with her and buy his peace without any intention on her part of actually contesting the will if no such settlement was made, would not be sufficient and would not constitute a valid consideration for the defendant's promise. There was evidence warranting a finding that the plaintiff was acting in good faith when she declared her intention to contest the will. But inasmuch as no instructions were given to the jury as requested in respect to the matter of good faith, we are constrained to sustain this exception.

The contract, being supported by a good consideration, was none the less binding although entered into by the parties under a mistaken idea as to their respective legal rights and obligations. There was no fraud or misrepresentation and the defendant was fully acquainted with all the facts.

The remaining question relates to the statute of frauds. We do not think that the promise comes within the statute. The defendant was, as he contends, executor by virtue of his appointment by the testator when the promise was made (*Rand v. Hubbard*, 4 Met. 252, 256), but the promise was for his own benefit and was an original and not a collateral undertaking on his part. By reason of the plaintiff's forbearance to contest the will he secured the undisputed confirmation of his title to the real estate which was specifically devised to him, and the plaintiff gave up and lost the opportunity to contest the allowance of the will. To permit the defendant to set up the statute of frauds under such circumstances would be to allow him to perpetrate a fraud by means of it. *Nelson v. Boynton*, 3 Met. 396. *Alger v. Scoville*, 1 Gray, 391. *Browne*, St. Frauds, (5th ed.) § 212. Moreover the promise of an executor, to come within the statute, must be to pay out of his own estate a debt or obligation primarily due from the estate of the deceased. In the present case the estate of the deceased did not owe and never has owed the plaintiff anything on account of the legacy, for the reason that it was a general one and there were

no assets with which to pay it, the personal property being exhausted by the payment of debts and the expenses of administration, last sickness and funeral and of the specific legacies. There was therefore no debt due from the estate to which the defendant's promise as executor could apply, and for this reason also the promise was not within the statute.

Exceptions sustained.

The case was submitted on briefs.

J. J. Foley, for the defendant.

F. G. Cook, for the plaintiff.

GEORGE E. JACOBS vs. ARTHUR E. WHITNEY.

Middlesex. January 12, 1910. — May 17, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Will, Effect of foreign will. Conflict of Laws, Interpretation and effect of foreign will. Devise and Legacy, What estate. Partition. Words, "Vested," "Then living," "Under lawful age and without issue," "And."

Statement by MORTON, J., of the rule of law that the will of a person who dies testate and domiciled in another State, leaving property in this Commonwealth, shall be interpreted according to the law of the State where the testator was domiciled at the time of his death, and of some of the exceptions thereto.

A testator by his will devised certain real estate in this Commonwealth to trustees with directions that his brother might have the use of it during his life, that after the death of the brother one third of the income therefrom should be paid to the brother's wife during her life "and the remaining two thirds . . . shall be divided among the children of my said brother, in the proportion of three eighths thereof to his son A., and five eighths thereof equally to his other children, then living during the lifetime of their mother; and immediately after the decease of" the brother and his wife "I direct that the said real estate . . . shall be vested in the children" of the brother "in the same proportions as above mentioned as to the income thereof. If any of the said children be then deceased, under lawful age and without issue, the surviving children . . . to take the share of said decedent in the same proportions but if either of the said children be then deceased leaving lawful issue him or her surviving, such issue shall take and if more than one divide equally among them, the part or share his her or their deceased parent would have taken if then living." At the time of the testator's death, the brother and his wife and six of their children were living. One of the children died before the father and mother and before reaching the age of twenty-one, intestate and without issue. Another, F., after having been adjudged insolvent and after his property had passed to his assignee in insolvency under the laws

of this Commonwealth, died without issue and of more than lawful age during the lifetime of his father and mother. The assignee in insolvency conveyed what interest he had to one who, after the death of the testator's brother and his wife, petitioned for a partition of the real estate in question. *Held*, that the interest of the children of the testator's brother in the real estate in question vested at the time of the testator's death, and therefore that the petitioner received from F.'s assignee in insolvency an interest in common which gave him a right to a partition.

MORTON, J. This is a petition for the partition of land in Winchester of which one Asa Whitney died seised in fee simple in 1873. The question in the case relates to the construction of the sixth article of his will. At the time of his death he was domiciled in Philadelphia and the will was drawn and executed there. It was duly admitted to probate in Philadelphia in 1874, and in 1875 was admitted to probate as a foreign will in the Probate Court for Middlesex County in this State, and the trustees named in the will were duly appointed and qualified by that court. The judge of the Superior Court by whom the case was heard * ruled and found, subject to the respondent's exceptions, that the petitioner was entitled to partition, and at the request of the respondent reported the case to this court. If his rulings and findings are correct, judgment is to be entered that partition be made; otherwise the case is to be disposed of as law and justice may require.

By the sixth clause of his will the testator gave and devised to his sons George, John R. and James S. Whitney and the survivors and survivor of them, all his real estate and property in Winchester, "in trust nevertheless . . . at their discretion to permit my said brother Joel Whitney to use occupy and enjoy the said real estate for and during all the term of his natural life. . . . In case Esther Whitney wife of my said brother Joel shall survive her husband my will is and I direct that one third of the clear yearly value or rental of said real estate . . . shall be paid half yearly to the said Esther Whitney, for and during all the term of her natural life for her own use absolutely and the remaining two thirds of said rent . . . shall be divided among the children of my said brother, in the proportion of three eighths thereof to his son Arthur E. Whitney, and five eighths thereof equally to his other children, then living during

* Sanderson, J.

the life time of their mother ; and immediately after the decease of said Joel Whitney and wife I direct that the said real estate . . . mentioned in this article, shall be vested in the children of the said Joel Whitney, in the same proportions as above mentioned as to the income thereof : if any of the said children be then deceased, under lawful age and without issue, the surviving children of my said brother to take the share of said decedent in the same proportions but if either of the said children be then deceased leaving lawful issue him or her surviving, such issue shall take and if more than one divide equally among them, the part or share his her or their deceased parent would have taken if then living."

Joel and his wife were both living at the death of the testator and had six children then living. Of these Evelyn died during the lifetime of her father and mother and of her brother, Fred M. Whitney, upwards of twenty-one, intestate and without issue. Fred M. Whitney, under whom the petitioner claims title, died in 1890, during the lifetime of his father and mother, also intestate and without issue, and of more than lawful age. In August, 1889, he was adjudged insolvent by the court of insolvency of Suffolk County, and all his interest in the property in question passed to his assignee in insolvency from whom it came by mesne conveyance to the petitioner.*

The question is whether, as contended by the petitioner, the interest which Fred M. Whitney took under the will of Asa Whitney was a vested remainder, or whether, as contended by the respondent, it was contingent on his surviving his father and mother, or, what amounts to the same thing so far as the result in this case is concerned, whether if vested, it was subject to be divested by his death without issue during the lifetime of his parents. We do not understand the respondent to contend that, if vested, it did not pass to the petitioner, or that the petitioner is not entitled in that event to partition.

The judge ruled as requested by the petitioner that the will should be construed according to the law of Pennsylvania, as it was interpreted at the time and place where it was drawn and ex-

* Joel Whitney died in 1893, and his wife died in 1900. The original petition in this case was filed on February 13, 1909, and was amended on May 21, 1909.

ecuted; and so far as the question was one of fact the judge must be taken, by his ruling and finding that the petitioner was entitled to partition, to have found that the law of Pennsylvania was as contended by the petitioner, and that the remainder was vested and not contingent. We assume in favor of the respondent, but without so deciding, that the form of the report is such that all questions in relation to the proper construction of the will, however arising, are open to him. See *McCurdy v. McCallum*, 186 Mass. 464.

The testator having been domiciled in Philadelphia when the will was drawn and executed, and dying there, the will must be interpreted as it would be interpreted there, unless the circumstances under which it was executed or the nature of the will itself requires a different construction. *Brandeis v. Atkins*, 204 Mass. 471. *McCurdy v. McCallum*, 186 Mass. 464. *In re Ferguson's will*, [1902] 1 Ch. 483. *Ford v. Ford*, 70 Wis. 19. *Keith v. Eaton*, 58 Kans. 732. Wharton, Conflict of Laws, (3d ed.) § 599 a. This rule applies with full force and effect to personal property wherever situated. The construction and effect given to the will by the courts of the testator's domicile are everywhere recognized as binding. *Brandeis v. Atkins*, 204 Mass. 471. *Enohin v. Wylie*, 10 H. L. Cas. 1. *In re Trufort*, [1887] 36 Ch. D. 600. This is upon the theory that the situs of such property is supposed to be where the owner has his domicile, though for certain purposes, no doubt, the actual situation of the property may be taken into account. *Frothingham v. Shaw*, 175 Mass. 59. With regard however to real property situated in another jurisdiction, another rule applies. While the will is presumed in the absence of anything to the contrary to have been drawn in accordance with the law of the testator's domicile and will be interpreted accordingly, its effect and validity in respect to the disposition of real property so situated or the creation of any interest therein will depend upon the *lex rei sitæ*. *Brandeis v. Atkins*, *supra*. *De Vaughn v. Hutchinson*, 165 U. S. 566. *Robertson v. Pickrell*, 109 U. S. 608. *White v. Howard*, 46 N. Y. 144. *West v. Fitz*, 109 Ill. 425. *Ford v. Ford*, *supra*. *Alexander v. Waller*, 6 Bush, (Ky.) 330. *Atkinson v. Staigg*, 13 R. I. 725. Dicey, Conflict of Laws, (Moore's ed.) 516. Redfield on Wills, (2d ed.) 398, § 8. Thus in *Sewall v. Wilmer*, 132 Mass.

131, a power of appointment which included real estate situated in this State was held to have been properly executed according to the law of this Commonwealth though it was not according to the law of Maryland where the person executing it was domiciled. If, therefore, the ruling of the court is to be understood as meaning that if the remainder was vested according to the law of Pennsylvania as it was at the time when the will was executed, it must be regarded as vested here also, the ruling was not strictly correct. But the error was immaterial for the reason that whether the law of Pennsylvania or of this State applies, and whether, if the law of Pennsylvania applies, it is to be ascertained as of the date of the execution of the will or as of a later period, the remainder was, we think, as the trial court found and ruled, a vested and not a contingent remainder.

The testator devised the property in trust for the benefit of his brother Joel during his life. After the brother's death one third of the income was to be paid over half yearly during her life to the brother's wife if she survived him, and the remaining two thirds were to be divided among the brother's children in the proportion of three eighths to Arthur and five eighths equally among the other children then living during the mother's lifetime. Upon the death of the brother and his wife the property was to vest in the brother's children in the same proportions as directed in regard to the payment of the income. That is, as we construe the word "vested" as used in the will in this connection, the children were then to come into possession of the property. If any of them should then be deceased under lawful age and without issue, the survivors were to take the share of the decedent in the same proportions as were provided in regard to the income, but if either of them was deceased leaving issue him or her surviving, such issue were to take the share which the deceased parent would have taken if then living. This is the scheme of the will so far as it relates to the matter in controversy and it manifestly contemplates, it seems to us, that upon the termination of the trust and of the life estates the property shall go to Joel's children, and that if any of them shall have deceased in the meantime, under age and without lawful issue, his share shall go to his brothers and sisters, and that if he has deceased leaving lawful issue surviving him such issue

shall take it. There is nothing uncertain or contingent about those who are to take, or what they are to take, or when they are to take. Those who are to take are Joel's children, and the time when they are to take is at the testator's death when the will goes into effect, and, inasmuch as the property is subject to life estates in favor of Joel and his wife, what they take is manifestly the remainder to which they become absolutely entitled at the moment of the testator's death subject only to the contingency of dying intestate and without issue before the period when they are to come into possession arrives, in which event the share which they or their issue would otherwise have taken goes to their surviving brothers and sisters subject to a like contingency on their part if they die under lawful age and without issue. See *Pike v. Stephenson*, 99 Mass. 188; *Bosworth v. Stockbridge*, 189 Mass. 266; *Richards v. Burbank*, 201 Mass. 253; *Wade v. Wade*, 203 Mass. 1; *Frame v. Stewart*, 5 Watts, 433, 434; *Manderson v. Lukens*, 23 Penn. St. 31; *Womrath v. McCormick*, 51 Penn. St. 504; *Snyder's estate*, 180 Penn. St. 70; *Carstensen's estate*, 196 Penn. St. 325, 328; *In re Phillips' estate*, 205 Penn. St. 504; *Hood v. Pennsylvania Society*, 221 Penn. St. 474, 476.

The respondent contends, as we understand him, that inasmuch as the proportions into which the remainder is to be divided are the same as those into which the income is to be divided, and the income is to be divided three eighths to Arthur and five eighths to the "other children then living," it follows that the proportions into which the remainder is to be divided cannot be the same unless the remainder is also divided amongst the children "then living." But the words "then living," in the connection in which they are thus used, apply to the division of the income only. The proportions referred to in the final division amongst the children are the fractional divisions of three eighths and five eighths without any limitation to the children then living. This is the natural construction. During the mother's life the testator provides that the income shall be divided amongst the children then living, but when it comes to the final disposition of the property he makes, as we already have observed, no such limitation.

We see no reason for giving to the words "under lawful age

and without issue" any other than their obvious meaning. There is no reason to doubt that the contingency intended to be provided for is that expressed by the language used, and we see nothing requiring that the word "and" should be construed as meaning "or."

Judgment to be entered that partition be made.

E. W. Crawford, for the petitioner.

John Chipman Gray, (*S. Robinson* with him,) for the respondent.

JOHANNAH GAGNON, administratrix, vs. BOSTON ELEVATED
RAILWAY COMPANY.
SAME vs. SAME.

Suffolk. January 20, 1910. — May 17, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY,
SHELDON, & RUGG, JJ.

Negligence, Street railway, Gross, Causing death. *Evidence*, Violation of rule as evidence of negligence, Presumptions and burden of proof.

A corporation, which operates a street railway in the subway in Boston, where the platforms in the stations are well lighted, and which has instructed the conductors of cars entering and leaving the stations to stand upon the lower right hand step of the rear platform of the cars, facing outward with one hand grasping the hand rail on the body of the car and the other the rail on the dasher "to keep any person from boarding the car while it is in motion," need not take the additional precaution of requiring, as to trains composed of two closed surface cars coupled together, that the doors into the rear vestibule of the first car shall be closed until the trains come to a standstill, and a failure to make this requirement is not evidence of negligence on the part of the corporation.

In actions against a corporation operating a street railway in the subway in Boston to recover for the conscious suffering and death of the plaintiff's intestate, who, while attempting to get aboard the first car of a train of two closed surface cars as they were passing slowly to a berth in a station in the subway, lost his hold and fell beneath the rear car and was run over and killed, it appeared that rules of the defendant required its conductors to stand upon the lower right hand step of the rear platform of cars entering the station, facing outward with one hand grasping the hand rail on the body of the car and the other the rail on the dasher "to keep any person from boarding the car while it is in motion," that the conductor on the car which the plaintiff's intestate attempted to board was not on such step but was on the platform of the car, that

there was no crowd upon the platform, which was well lighted, and that the plaintiff's intestate was acting under no exigency, infirmity or limitation. *Held*, that under the circumstances the act of the conductor in not observing the rules of the defendant did not constitute negligence toward the plaintiff's intestate.

In actions against a corporation operating a street railway in the subway in Boston to recover for the conscious suffering and death of the plaintiff's intestate, who, while attempting to get aboard the first car of a train of two closed surface cars as they were passing slowly to a berth in a station in the subway, lost his hold and fell beneath the rear car and was run over and killed, it appeared that the conductor of the rear car, who in the course of his duties was standing on the step of the rear platform thereof, saw the plaintiff's intestate as he was falling, called out loudly to the conductor of the forward car, who was disobeying a rule of the corporation and was upon the rear platform and not upon the step of the car which the plaintiff's intestate was attempting to board, and then, either without giving any signal from the platform where he was or without giving an emergency signal which would have caused the car to be stopped instantly, ran forward to assist the plaintiff's intestate. *Held*, that there was no evidence of negligence on the part of the conductor of the second car toward the plaintiff's intestate.

TWO ACTIONS OF TORT by the administratrix of the estate of Zephron Gagnon, the first to recover for the conscious suffering, and the second for the death of the plaintiff's intestate due to his having fallen beneath and been run over by the second car in a two car surface train of the defendant in the Park Street station of the subway in Boston on October 28, 1905. Writs dated July 20, 1906.

The cases were tried together before *Brown, J.* After the plaintiff's counsel had made an offer of proof in writing, setting forth evidence, the substance of which is stated in the opinion, the presiding judge ordered verdicts for the defendant; and the plaintiff alleged exceptions.

The cases were argued at the bar in January, 1910, before *Knowlton, C. J., Hammond, Braley, Sheldon, & Rugg, JJ.*, and afterwards were submitted on briefs to all the justices.

E. V. Grabill, for the plaintiff.

W. G. Thompson, (*S. H. E. Freund* with him,) for the defendant.

RUGG, J. A two car train of the defendant, whose crew consisted of three, the motorman in the forward end of the first or motor car, Corbett, the conductor of the same car standing on its rear platform, and Foster, the conductor of the second car or trailer standing on the step of its rear platform, moved slowly along the platform of the subway station at Park Street and

was about a car length from the place where it was to stop, when the plaintiff's intestate attempted to get upon the rear platform of the motor car, but his hand slipped from the grab iron and he fell under the train, and received mortal injuries. There was in force a rule of the defendant, which required conductors at this station to "take position on right hand rear step of car platform, with left hand grasping the body rail and right-hand the dasher hand rail, facing outward toward the station platform and ride thus until the car arrives at its assigned berth. . . . The object of this is to keep any person from boarding the car while it is in motion." Another general rule required conductors to take a similar position under circumstances here disclosed "so as to guard the platform, and to prevent any person getting on or off while the car is in motion. This rule must be complied with in a manner to avoid controversy and insure the safety of passengers." Corbett, the conductor of the motor car, was violating these rules at the time of the accident by standing upon the platform of his car and not on its step.

The plaintiff can prevail only by showing at the least negligence of the defendant or of its servants. It has not been argued that there was any unfitness of its servants. It is urged, however, that negligence of the defendant may be inferred from its failure to require that the entrance doors be closed until the car came to a standstill. This was not an elevated train, but one composed of two trolley cars of the ordinary type. They were proceeding slowly along a well lighted platform at which they were to stop to receive passengers. There was no obscure or hidden danger connected with attempting to board such a car under these conditions. Everything was plainly in view, and the material circumstances were as well known to the ordinary passenger as to the defendant. The duty rested upon the defendant of providing for the public the quickest possible entrance to its cars consistent with safety. It would be unjust to hold the defendant negligent for permitting, by the mechanical construction and operation of its cars, the plaintiff's intestate to do that which she must show was due care on his part in order to recover in the action for conscious suffering. Hence there was no negligence on the part of the defendant.

It is argued that there was evidence from which the negli-

gence of Corbett, the conductor of the motor car, may have been found from the fact that he was violating the rule of the defendant which required him to be standing upon the lower step of his car, grasping each hand iron, so as to stop people from getting upon the car while it was in motion. *Stevens v. Boston Elevated Railway*, 184 Mass. 476, *Burns v. Worcester Consolidated Street Railway*, 193 Mass. 63, 66, *Partelow v. Newton & Boston Street Railway*, 196 Mass. 24, 30, *Chadbourn v. Springfield Street Railway*, 199 Mass. 574, and *Crowley v. Boston Elevated Railway*, 204 Mass. 241, are claimed to be authorities in support of this contention. But the principle established by these cases has never gone to the extent of holding that the violation of a rule, enacted by a common carrier for the purpose of preventing members of the public from taking a wholly obvious risk is, by itself and apart from any other act of carelessness, evidence of negligence upon which the plaintiff can rely as a direct cause of injury. Apparently the primary object of the rule was to require its employees to protect the defendant from claims for personal injuries sustained by those who, relying upon cases like *Corlin v. West End Street Railway*, 154 Mass. 197, *Marshall v. Boston Elevated Railway*, 203 Mass. 40, 42, and *Payne v. Springfield Street Railway*, 203 Mass. 425, 432, try to get on a moving trolley car. In connection with other circumstances showing want of ordinary prudence, and sometimes without such support, violation of a rule would be entitled to consideration. But in the case at bar every element of danger was manifest and as plain to the plaintiff's intestate as it could be to any servant of the defendant. There was nothing concealed, dim or uncertain. There was no crowd upon the platform. The deceased was acting under no exigency, infirmity or limitation. If there had been no rule, it is plain that it could not be even plausibly contended that there was evidence of negligence on the part of Corbett. The argument of the plaintiff is that it was the exercise of due care on the part of her intestate to endeavor to board a moving car, and that it was negligence on the part of the conductor not to restrain him from such an attempt. She predicates negligence of the defendant's servant on his failure to thwart her intestate in his effort to use due care. The bald statement of such a propo-

sition is its refutation. Under the conditions here disclosed, the act of the defendant's conductor in not observing such a rule, when there is nothing else to show want of proper caution on his part, cannot be treated as negligence toward the plaintiff's intestate.

Nor is there sufficient evidence of negligence on the part of the conductor Foster, who was on the step at the rear of the trailer.* It is urged that he should have acted with more agility after discovering the peril of the plaintiff's intestate, and also that he should first have gone to his platform and signalled for an instant stop. He shouted to the conductor of the motor car, and rushing forward strove unsuccessfully to rescue the plaintiff's intestate. He did what might have appeared to any reasonable man the most practical and humane thing to do. It is pure speculation whether any other course would have produced better results.

As there is no evidence of negligence upon which the action for conscious suffering may be supported, it follows that there was no gross negligence of any servant or agent of the defendant, and the action under R. L. c. 111, § 267, fails.

Exceptions overruled.

* The offer of proof as regarded the conduct of Foster was as follows: "Foster, . . . standing on the rear step [of the rear car] saw what was happening. He called out loudly to Corbett, the conductor of the forward car, and says that he himself also instantly jumped upon the rear platform of the trailer car and pulled his buzzer strap three times, which, if he did, would have given the emergency signal, so called, that is, the signal to both the conductor and the motorman of the motor car for stopping the train instantly wherever it was. But the plaintiff offers and expects to prove that Foster either did not pull the buzzard strap at all, or else did not pull the emergency signal of three buzzers. He did, however, run forward in an attempt to keep Mr. Gagnon from being run over, but did not succeed in this attempt. Corbett, having his attention attracted by Foster's yell, pulled in three bells. The motorman, McNeilly, heard only three bells and no buzzer, and immediately stopped the car upon hearing those three bells, but not until the last of the rear wheels of the trailer car had passed almost entirely over the body of Mr. Gagnon."

CHARLES S. MERSICK & another vs. ABRAHAM BILAFSKY
& another.

Suffolk. March 1, 1910. — May 17, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Partnership, What constitutes. Evidence, Admissions and confessions.

At the trial of an action against a father and his son for the purchase price of certain plumbing goods which were alleged to have been furnished by the plaintiff under a special contract made with the defendants about July 80 of a certain year for use in buildings which were being erected for a third party, a material question was whether the defendants were partners. There was evidence tending to show that shortly after the son became of age, which was previous to the time of the alleged contract with the plaintiff, he and his father, whose name was B., used the same office and a letter head with the imprint "B. & Son, Real Estate and Insurance," with the office address thereon; that in the January preceding the making of the contract, in bankruptcy proceedings concerning the person for whom the houses were being built, the father had testified that he and his son were partners; that bills for the goods furnished were sent almost weekly to the father at the office occupied by him and his son, and that not until November, after substantially all of the goods had been furnished and actually used, was any notice received from the father that he was not the person to be charged for the goods; that the son had drawn a check in the father's name, by himself as attorney, to pay for the examination of the title of the property upon which the houses were being built; that the father had what was intended ultimately to be a second mortgage upon that property, which had been given by the owner to a man of straw and assigned to him; that the father was on the premises while the buildings were being constructed and made complaints in regard to some of the materials that were furnished; that the father was introduced by one agent of the plaintiff to another as one of their customers while the goods were being furnished, and made no objection thereto; that the son in talking to the plaintiff's agent said that "they" wanted to get the plumbing material, and spoke of their interest in the property, using the word "we," and, upon the agent's refusing credit to the owner, assented to the offer of the plaintiff to furnish the goods to "them" if "they" would pay for them; and that a letter by the plaintiff's agent to the father requesting a written order for goods "your plumber has ordered" came back with the words indorsed thereon in pencil, "Send goods at once"; that while the account was running some one who said he was "Mr. B." asked the plaintiff's agent over the telephone to change the account from the name of the father to that of the son, as the son was acting as trustee for the owner. The foregoing evidence was contradicted in all essential particulars. *Held*, that the question whether the defendants were partners was for the jury.

While it is true that declarations or acts of one partner, in the absence or without the knowledge of the other, are not evidence of the existence of the partnership as against such other, such declarations or acts are admissible against the party making them, and the existence of a partnership thus may be established against both partners by the separate admissions of the individuals composing it.

CONTRACT against Abraham and Benjamin F. Bilafsky, with a declaration in three counts, the first on a special contract, made about July 30, 1902, for plumbing goods furnished for three houses being built on Addington Road in Brookline for one Louis Habelow, the second count on an account annexed for goods furnished outside the contract, and the third on an account annexed for the goods described in both the first and second counts. Writ dated December 18, 1902.

The case was referred to George R. Blinn, Esquire, as auditor. He filed a report, in which he found that the plaintiffs had delivered the goods described in the declaration in accordance with an agreement made with the defendant Benjamin F. Bilafsky, and found for the plaintiffs against him. As to the defendant Abraham Bilafsky, he found as follows: "I find that on the other hand the defendant Abraham had no knowledge of the making of said agreement and is not bound thereby; that he never agreed to pay for said goods and that he is in no way liable therefor. The plaintiffs introduced evidence tending to show the existence of a partnership between the defendants at the time of the making of said contract for furnishing the said plumbing supplies, and I find that such partnership did then exist but that it was limited to the real estate and insurance business carried on by them and that the transactions in question did not come within the scope of said partnership, and that the defendant Abraham did nothing which would make him liable as such partner to the plaintiffs. I consequently find that as against the defendant Abraham the plaintiffs are not entitled to recover."

The case was tried before *Sanderson, J.*

The letter head on the letter dated October 14, 1902, which was a letter from Habelow to Rounds and Dennison Corporation requesting them to send "to Addington Road, Brookline, the finish plumbing," was as follows:

Notary Public.

Justice of the Peace.

A. Bilafsky & Son,
Real Estate and Insurance
30 Court Street.

Other facts are stated in the opinion.

The jury found for the plaintiffs against both defendants; and the defendants alleged exceptions.

J. C. Ivy, for the defendants.

F. N. Nay, (*L. W. Peters* with him,) for the plaintiffs.

MORTON, J. This is an action of contract to recover from the defendants for plumbing materials alleged to have been furnished to the defendants for use in the construction of certain houses which one Louis Habelow was building in Brookline. The answer was a general denial and the statute of frauds. The case was sent to an auditor who found against the defendant Benjamin and in favor of the defendant Abraham. Afterwards there was a jury trial, and a verdict for the plaintiffs for the full amount claimed was returned against both defendants. The case is here on exceptions by both defendants to the refusal of the presiding judge to give certain rulings that were requested, and to the instructions that were given. There are also numerous exceptions in regard to the admission and exclusion of evidence.

The goods were furnished through the Rounds and Dennison Corporation, who acted as Boston agents for the plaintiffs, and the principal question is whether there was any evidence warranting a finding that the defendants were partners, either generally or as to the real estate for which the goods were furnished. We think it is plain that there was. A letter head was introduced in evidence bearing the imprint "A. Bilafsky & Son, Real Estate and Insurance, 30 Court Street." When the defendant Benjamin was asked on cross-examination when that first began to be printed he answered, "After I became twenty-one years of age," meaning, it might fairly be inferred, soon after he became twenty-one, which, according to the statement of his age elicited in his cross-examination, would fix the time as previous to the time when the plaintiffs began to furnish the goods sued for. There was also testimony tending to show that the defendant Abraham had testified in bankruptcy proceedings concerning Louis Habelow in January, 1902, that he and his sons were partners. He attempted to qualify and explain this, but it was for the jury to give his testimony such weight as they thought it fairly entitled to. There was also testimony tending to show that the two occupied the same office at 30 Court

Street, that bills for the goods furnished were sent almost weekly to the defendant Abraham at 30 Court Street, and that it was not until November 12, after substantially all of the goods had been furnished and actually used in the construction of the buildings, that any notice was received from him that he was not liable; that the defendant Benjamin drew a check in his father's name, by himself as attorney, to pay for the examination of the title to the property, though he testified that he afterwards returned the amount to his father; that the defendant Abraham had what was intended ultimately to be a second mortgage on the property given by Habelow to a man of straw and assigned to him; that he was on the premises while the buildings were in the process of construction and complained in regard to some of the materials that were furnished; that he was introduced by one of the members of the Rounds and Dennison Corporation to the other as one of their customers while the goods were being furnished, and made no objection thereto; that the defendant Benjamin said in talking with Mr. Dennison of the Rounds and Dennison Corporation, that "they" wanted to buy a lot of plumbing material, and spoke of the interest which they had in the property, using the word "we," and, when Mr. Dennison refused to bill the goods to Habelow on the ground that he was in bankruptcy, assented to the offer made to furnish the goods to "them" if "they" would pay for them; that a letter addressed to the defendant Abraham requesting a written order for goods "your plumber has ordered" came back with the words indorsed on it in pencil, "Send goods at once"; and that Rounds and Dennison were called up while the account was running by what purported to be a telephone message from Bilafsky's office, the person at the other end saying that it was Mr. Bilafsky talking, and asking to have the account changed from A. Bilafsky to B. F. Bilafsky, for the reason that he was acting as trustee for Habelow. There were also other circumstances bearing upon the nature of the business relations between the defendants when the contract for furnishing the goods was entered into by the plaintiffs, and during the time that the goods were being furnished.

Both defendants strenuously denied that they were partners, and denied many of the things testified to as above and offered

explanations as to others, and testified to matters tending to show that they were not partners and that the goods were furnished to Habelow and that neither one of them was liable therefor. The auditor also found that they were not partners. In this conflict of evidence it was plainly for the jury to determine what the facts were and to decide, if they could, where the truth lay. It clearly could not have been ruled, it seems to us, that there was no evidence warranting a finding that the defendants were partners. See *Bagley v. Wonderland Co.* 205 Mass. 238.

It is no doubt true, as the defendants contend, that the declarations or acts of one partner, in the absence or without the knowledge of the other, are not evidence of the existence of a partnership as against such other. But they are admissible against the party making them, and a partnership may thus be established by the separate acts and admissions of those who it is contended constitute it. *Currier v. Silloway*, 1 Allen, 19. *Rosseau v. Deschenes*, 203 Mass. 261. Applying this rule we see no error in the admission of the evidence that was offered for the purpose of showing that the defendants were partners. The letter head on the letter dated October 14, 1902, written by Habelow, was plainly admissible as tending to show that the defendants were holding themselves out as partners, and derived additional significance from the facts that appeared in relation to Habelow's connection with them. In regard to the scope and effect of evidence of acts and representations by one defendant as against the other defendant, the jury were instructed in accordance with the rule stated above. Neither do we see any error in the instructions or refusals to instruct in respect to what would have to be found to establish a partnership. The question was essentially one of fact, and the jury were so told and were also instructed in substance and effect that partnerships might be established in different ways, and that it was for them to consider the various matters that had been introduced in evidence and give them such weight as they thought they were entitled to; and if they found that the defendants "were together in this enterprise and were responsible for this contract" with the plaintiffs, then they would be justified in returning a verdict against both defendants; otherwise not. We do not think that the instructions thus given afford the defendants any just ground for complaint.

The trial judge instructed the jury that unless it was shown by a preponderance of the evidence that the goods had been delivered to and accepted by the defendants or their authorized agent, the case would come within the statute of frauds and there could be no recovery. He further instructed them that in order to constitute an acceptance there must be some clear and unequivocal act on the part of the defendants or their authorized agent. It is plain that there was evidence warranting a finding that the goods had been delivered to and accepted by the defendants or their authorized agent, and that the case did not therefore come within the statute of frauds.

As we have said, numerous exceptions were taken to the admission and exclusion of evidence. It would seem as though many of them were taken with little regard to what the law really was and were utterly frivolous. We have considered them all and find nothing in any of them which requires the exceptions to be sustained.

Exceptions overruled.

ALBERT B. BURDITT vs. INHABITANTS OF WINCHESTER.

Middlesex. March 1, 1910. — May 17, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Negligence, In use of highway. *Way*, Public, Notice to municipality of existence of defect.

At the trial of an action under R. L. c. 51, § 18, against a town to recover for personal injuries caused by the plaintiff's running into a barrier in a highway while he was riding from his work to his home on a bicycle, there was evidence tending to show that the highway was open to public travel, that the accident happened at about seven o'clock in the evening of an October 2, that it was dark and that there were no lights at the place of the accident, that the barrier could not be seen until one was close upon it, and that when the plaintiff ran into the barrier he was travelling at the rate of about seven miles an hour. *Held*, that the question, whether the plaintiff was in the exercise of due care when he was injured, was for the jury.

In an action under R. L. c. 51, § 18, against a town by one, who while travelling upon a public highway received personal injuries by reason of his running into a barrier negligently left in the highway, if it appears that the barrier was so left by one who was engaged in the work of resurfacing the street under a superintendent of streets appointed by the town's selectmen pursuant to R. L. c. 25, §§ 85, 86, such negligent act of the employee must be deemed to have been the

town's own act, so that no further notice to the town of the existence of the defect need be proved.

In an action under R. L. c. 51, § 18, against a town by one, who while travelling upon a public highway received personal injuries by reason of his running into an unlighted barrier in the highway at about seven o'clock in the evening of an October 2, it appeared that the barrier had been used by employees of the defendant during the day to warn travellers that a steam roller was at work upon the street, that the workmen ceased work about two hours before the accident and that the barrier should then have been removed, that the street was a main thoroughfare of the town, was macadamized, was lighted with electric lights and had an electric railway upon it, that there were houses in the vicinity, and that the place of the accident was a mile and a half from the centre of the town. *Held*, that the jury would have been warranted in finding that the town authorities in the exercise of reasonable care should have known of the defect.

TORT under R. L. c. 51, § 18, for personal injuries alleged to have been caused by a defect in Washington Street in Winchester. Writ dated November 23, 1901.

The case was tried before *Pierce, J.* There was evidence tending to prove the following facts:

On October 2, 1901, employees of the superintendent of streets of the defendant were engaged in renewing a portion of the surface of Washington Street, a public way, near its junction with Forest Street, and were using a steam roller. It was the duty of one of the employees to put out, at a point two or three hundred feet from the place where the roller was at work, a wooden horse or barrier six to seven feet long against which leaned a sign notifying travellers upon the highway of the presence of the roller. It was the duty of this employee at night, when the roller was removed from the street, to remove this barrier or horse, and it was not intended that it should be left in the street either with or without lights upon it. The employees of the street department on that date discontinued their work at five o'clock in the afternoon, but through the negligence of the employee charged with the duty of removing it, this horse or barrier with the sign upon it was left standing in Washington Street. No evidence was offered to show that the superintendent or the selectmen or any one of them had any personal knowledge of the fact that this horse or barrier had been left in the street. The defendant produced evidence tending to show that it was so left without the knowledge or consent of any other person connected with the work. Two witnesses

called by the plaintiff, citizens of Winchester living near the scene of the accident, testified that they saw the barrier in the street after five o'clock and before the time of the accident, but both of them testified that they gave no notice to any one of this fact.

Shortly after seven o'clock the plaintiff, who was familiar with the locality, was returning upon his bicycle to his home, when he ran into the horse and was injured. The plaintiff testified that it was dark at the time and that he was riding at approximately seven miles an hour, that there were no lights at the place of the accident and that the horse could not be seen until he was close upon it.

The defendant at the time of the accident had not authorized the election of road commissioners or surveyors of highways, but the streets were repaired by a superintendent of streets appointed by the selectmen of the town in accordance with the provisions of R. L. c. 25, §§ 85, 86. The repairs in progress upon Washington Street were under the supervision and direction of the superintendent of streets in accordance with a vote of the selectmen, and the expense thereof was paid out of the annual appropriations made by the town for the repair of highways and bridges. The men, including the employee through whose negligence the horse or barrier was left in the street, were hired by the superintendent and were discharged by him.

The place where the accident occurred was about one hundred and seventy-five feet south of the junction of Forest Street and Washington Street at a point about a mile and a half from the centre of Winchester. Washington Street was a main thoroughfare with a sidewalk and a street railway upon it, and there were houses in the vicinity of the accident.

At the close of the evidence the defendant asked the presiding judge to rule that upon all the evidence the plaintiff could not recover. The judge refused so to rule, the jury found for the plaintiff; and the defendant alleged exceptions.

The case was submitted on briefs.

R. E. Joslin, for the defendant.

G. L. Mayberry & J. P. Wyman, for the plaintiff.

MORTON, J. There was evidence warranting a finding that the plaintiff was in the exercise of due care. The street was

open to travel, and the plaintiff was riding his bicycle at a moderate speed and had no reason to apprehend that there was any obstruction or defect in the highway. There was testimony to the effect that the horse could be seen one hundred and fifty feet away. But there was also testimony that it could not be seen until one was close to it. In this state of the evidence it plainly was for the jury to say whether the plaintiff in the exercise of due care should have seen the horse in time to avoid a collision with it.

It is not seriously contended that the unlighted horse did not constitute a defect in the way.

The jury were rightly instructed that the town would not be liable for negligence on the part of one of the men employed in making the repairs in failing to remove the horse or in leaving it unlighted, and that in order to hold the town liable it must have had notice of the defect in time to have enabled it in the exercise of reasonable care to remove it before the accident. But the town was doing the work through a superintendent appointed by its selectmen, pursuant to R. L. c. 25, §§ 85, 86, and through men employed by him. The town had therefore notice by its servants and agents of the manner in which the work was being done, and if, in the course of doing the work, any of its servants or agents caused a defect in the way, the town must be deemed to have had notice thereby of the defect so caused. The act must be regarded in such a case as having been the town's own act, and as such it needed no notice of it. *Brooks v. Somerville*, 106 Mass. 271. *Hinckley v. Somerset*, 145 Mass. 326, 337. *Stoddard v. Winchester*, 157 Mass. 567, 574. *Pratt v. Cohasset*, 177 Mass. 488, 490. *McCarthy v. Dedham*, 188 Mass. 204, 208.

Independently of that we do not think that it could have been ruled as matter of law that the selectmen or the superintendent should not in the exercise of reasonable care have known of the defect. The place of the accident was a mile and a half from the centre of the town, but the street was a main thoroughfare, macadamized, with an electric railway upon it and electric lights, and with houses in the vicinity; and apparently there was considerable travel over it. The fact that the horse was in use was or easily might have been known, and the jury may well have thought that although

the defect had existed but a short time, nevertheless in the exercise of proper precautions by inspection or otherwise, after the men had quit work at night, the fact that the horse was there and was unlighted would have been discovered; in other words, that the town authorities, in the exercise of reasonable care should have known of the defect.

Under such circumstances it could not, as already observed, have been ruled as matter of law that the town was not liable. We see no error in the manner in which the trial was conducted.

Exceptions overruled.

NELLIE G. LEWIS & others vs. FRANCIS J. CROWELL,
administrator.

Barnstable. March 2, 1910. — May 17, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Mortgage, Of real estate. Constitutional Law. Limitations, Statute of. Statute, Construction.

A portion of R. L. c. 182, § 15, which originally was St. 1882, c. 237, provides that when the record title of land is incumbered by an undischarged mortgage, and the mortgagor and those having his estate therein have been in uninterrupted possession of the land for twenty years after the expiration of the time limited in the mortgage for the full performance of the condition thereof, he or they may apply to the court by petition setting forth the facts, and if, after such notice by publication or otherwise as the court orders, no evidence is offered of a payment on account of the debt secured by such mortgage within twenty years after the expiration of the time limited for the performance thereof or of any other act in recognition of its existence as a valid mortgage, the court may enter a decree reciting the facts and findings, which shall be recorded in the registry of deeds for the county or district in which the land lies, and no action to enforce a title under the mortgage shall thereafter be maintained. *Held*, that this provision is a statute of limitation, which merely affects the remedy and does not change the substantive rights secured by the contract of mortgage, and applies to a mortgage where the time limited for the performance of the condition of the mortgage expired more than twenty years before the year 1882 when the statute was enacted. *Held, also*, that, so construed, the statute is not unconstitutional as impairing the obligation of contracts.

Upon a petition under R. L. c. 182, § 15, St. 1882, c. 237, to remove a cloud from the title to the petitioner's land by declaring the discharge of a mortgage on the land, which had been in the uninterrupted possession of the mortgagor and those

holding under him for more than twenty years after the expiration of the time limited for the full performance of the condition of the mortgage, if after the notice required by the statute no evidence is offered of a payment on account of the debt secured by such mortgage within twenty years of the time limited for the performance thereof or of any other act within that period in recognition of its existence as a valid mortgage, the respondent cannot be allowed to show that the condition of the mortgage has not been performed; and, if it appears and is found as a fact that the condition of the mortgage has not been performed, the petitioner none the less is entitled to a decree, because possession by the mortgagor for twenty years without recognition of the mortgage, when the terms of the statute are complied with, is made an absolute bar to all claims under the mortgage.

PETITION filed in the Land Court on July 20, 1908, under R. L. c. 182, § 15, (St. 1882, c. 237,) to remove a cloud from the title to a lot of land of the petitioners on Bradford Street in Provincetown by declaring the discharge of a mortgage on the land, which was given on April 30, 1858, by William Whalen to David Crowell, late of Beverly, to secure the payment of \$150 with interest in two years from that date.

At the trial in the Land Court before *Davis, J.*, the facts appeared in evidence which are stated in the opinion. There also was evidence that the condition of the mortgage had not been performed. It appeared that the statute first was enacted in 1882, which was more than twenty years after the expiration of the time limited in the mortgage for the full performance of the condition thereof.

At the close of the evidence the respondent asked for the following rulings or findings:

"1. Upon all the evidence the petition should be dismissed.

"2. Under R. L. c. 182, § 15, a decree cannot be entered for the petitioners if it appears that the conditions of the mortgage have not been performed.

"3. The conditions of the mortgage in this case have not been performed.

"4. R. L. c. 182, § 15, having been enacted more than twenty years after the expiration of the time limited in the mortgage for the full performance of the conditions thereof, a decree cannot be entered for the petitioners."

The judge made a memorandum of his finding and refusal of rulings as follows:

"I find as requested by the respondent that the condition of

the mortgage has not been performed. The respondent's requests for rulings, however, I refuse."

The judge ordered a decree for the petitioners in ordinary form under the statute; and the respondent alleged exceptions.

The case was submitted on briefs.

R. A. Hopkins, for the respondent.

W. Welsh, for the petitioners.

KNOWLTON, C. J. This case presents a question in regard to the construction of the R. L. c. 182, § 15, (St. 1882, c. 237,) which has been referred to in former cases, but not decided. The facts come within the language of the statute, and give the court jurisdiction to enter a decree for the petitioner, within the decision in *McMahan v. McMahan*, ante, 99, unless by implication the finding "that the condition of the mortgage has not been performed" takes the case out of the statute and leaves the mortgage in full force.

It has been said in former decisions that the object of the statute is to provide for the removal of a cloud from a title when there has been twenty years' continuous possession by a mortgagor after the mortgage becomes due, without recognition of the mortgage. *Mitchell v. Bickford*, 192 Mass. 244, 246. *McMahan v. McMahan*, ante, 99. But there is no provision for reaching this result except when the statutory requirements are availed of in proceedings under this statute. By the terms of the statute, if the mortgage is to secure the payment of money, they can be availed of only when no evidence is offered of a payment on account of the debt secured by the mortgage within twenty years after the expiration of the time limited for the performance of the condition thereof, or of any other act within said time, in recognition of its existence as a valid mortgage. Unless the necessary facts are proved without the introduction of evidence tending to show the contrary, no action can be taken under the statute. *McMahan v. McMahan*, ubi supra. If the petitioners' averments are met with evidence of payment or other recognition of the mortgage within the twenty years referred to, the petitioners are left to their rights at common law, where they have the benefit of a presumption of payment after the expiration of twenty years, but are still subject to a determination of the fact whether the condition of the mortgage has been per-

formed. Their rights in such a case are fully stated in *Jenkins v. Andover Theological Seminary*, ante, 376.

If the mortgage is to secure the mortgagee against a contingent liability, the court, under the St. 1885, c. 283, embodied in the R. L. c. 182, § 15, may determine whether this contingent liability has ceased to exist, and whether the mortgage ought to be discharged.

In mortgages to secure the payment of money the presumption of payment after the lapse of twenty years is so strong that if, in addition, we have the neglect of the mortgagee to offer any evidence of payment or of a recognition of the mortgage when notified of an application to obtain a discharge under this statute, the Legislature may well treat it as establishing an absolute limitation upon the right of the mortgagee to enforce the mortgage. The words, "and no action to enforce a title under said mortgage shall thereafter be maintained" create this limitation.

The question is raised whether this statute was intended to apply to mortgages whose condition was to be performed before its enactment, or only to those in which the twenty years would begin to run afterward. The language seems plainly to apply to mortgages in which a part or the whole of the period had already expired, as well as to those, all of whose conditions were to be performed after the enactment of the statute. Upon the respondent's contention, no proceedings could be taken under the act until the expiration of twenty years or more from its enactment.

It is contended that this construction makes the statute unconstitutional, as impairing the obligation of contracts. But the Legislature may make a statute of limitations applicable to existing contracts, provided a reasonable time is given for the enforcement of them. A statute of limitations does not take away any substantive rights secured by the contract, but only affects the remedy. All the questions that arise upon this contention are fully answered in *Mulvey v. Boston*, 197 Mass. 178, and the cases there cited. When one has waited twenty years or more after the time fixed for the performance of a condition of a mortgage, without receiving any payment or other recognition of it, the Legislature may determine that, if he wishes to

enforce it by suit, he shall take action within thirty days. All the reasons for sustaining the validity of the act in *Mulvey v. Boston*, *ubi supra*, exist in the present case.

Inasmuch as the facts are established under this statute, and there is no evidence of any payment or other recognition of the mortgage within twenty years after the time when the condition of it was to be performed, we are of opinion that the case is within the express terms of the statute, and that these facts create an absolute bar under a special statute of limitations applicable only in proceedings of this kind. The fact that the condition of the mortgage has not been performed cannot be set up against the statute in this case. In *Mitchell v. Bickford*, 192 Mass. 244, 246, is this language: "We are of opinion that the object of the statute is to provide for the removal of such a cloud, and to make twenty years' possession by the mortgagor without recognition of the mortgage, if availed of in these proceedings, an absolute statutory bar to all claims under the mortgage."

Exceptions overruled.

**BENJAMIN P. CHENEY & another, trustees, vs. ASSESSORS OF
THE TOWN OF DOVER.**

Norfolk. March 2, 1910. — May 17, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Tax, Abatement. Practice, Civil, Appeal. Jurisdiction. Words, "Entering," "Filing."

Under R. L. c. 12, § 78, St. 1909, c. 490, Part I. § 77, a complaint or petition entered in the Superior Court by a person aggrieved by the refusal of the assessors of a city or town to abate a tax is an appeal, and must be entered in the Superior Court on the first return day after the expiration of thirty days from the giving by the assessors of the written notice of their decision required by a preceding section of the statute. By R. L. c. 167, § 24, the return day in the Superior Court is the first Monday of every month, and the Superior Court has no jurisdiction of such an appeal first attempted to be entered on the Thursday following such first Monday of the month next after the expiration of such thirty days.

It is a well established rule that where a remedy is created by statute the time within which it must be pursued is one of the prescribed conditions under which it can be availed of, and the court in which such remedy is sought has no jurisdiction to entertain proceedings for relief begun at a later time.

KNOWLTON, C. J. These petitioners presented to the assessors of the town of Dover an application for an abatement of a tax alleged to have been assessed erroneously. The assessors refused to abate the tax, and gave written notice to the petitioners of their decision, as required by the R. L. c. 12, § 76. This notice was given on June 29, 1909. The petitioners, feeling aggrieved by the refusal of the assessors, and acting under the provision which is found in the R. L. c. 12, § 78, and in St. 1909, c. 490, Part I. § 77, attempted to take an appeal to the Superior Court, and on Thursday, August 5, 1909, filed in that court the petition or complaint which is now before us. In it they set forth, among other things, that they were aggrieved by the refusal of the assessors to grant the abatement applied for, and that they therefore appealed from the refusal to the court. By the terms of the sections above referred to, an appeal to the Superior Court may be taken "by entering a complaint in said court on the first return day after the expiration of thirty days from the giving of the notice" of their decision by the assessors, as required by a preceding section. The statutory return day in the Superior Court is the first Monday of every month, so that the first return day after the expiration of thirty days from the giving of the notice was Monday, August 2. R. L. c. 167, § 24. The petitioners took out an order of notice on this petition, returnable on the first Monday of September, and caused it to be served upon the inhabitants of the town.

The respondents contended that the complaint or petition was entered in the Superior Court three days too late, and they appeared specially and filed a motion to dismiss for that reason. This motion having been allowed by a judge of the Superior Court * the case comes before us on an appeal by the petitioners. They contend that the entry intended by the statute was an entry after service of notice on the respondents, and they rely in part upon the provision that a writ against a town must be served thirty days before the return day. They argue that the entry in this case was seasonable.

* *Fessenden, J.*

We are of opinion that the decision of the Superior Court was correct. The language in the next preceding section relative to appeals to the county commissioners is "filing a complaint," instead of "entering a complaint," which are the words used in this section. But "entering" is the word ordinarily used for the commencement of a proceeding on the records of the Superior Court, while "filing" is more commonly used in reference to papers presented for action before county commissioners. This distinction is recognized in the St. 1891, c. 87. We are of opinion that the filing of the complaint with the clerk of the county commissioners and the entering of a complaint in the Superior Court called for the same kind of action in either case, and that the complaint to be entered in the Superior Court on the return day is to be in a form similar to that of the complaint to be filed with the clerk of the county commissioners within thirty days after receiving the notice. There is no requirement of a service of notice of the complaint upon the town in either case, it being assumed, apparently, that the knowledge of the assessors as officers of the town will sufficiently protect the interests of the inhabitants. By § 79 of c. 12 of the Revised Laws (§ 78 of St. 1909, c. 490, Part I.) the time for the hearing may be postponed at the request of the respondent.

It has often been decided that, when a remedy has been created by statute and the time within which it must be pursued is one of the prescribed conditions under which it can be availed of, the court has no jurisdiction to entertain proceedings for relief begun at a later time. *Custy v. Lowell*, 117 Mass. 78. *Peterson v. Waltham*, 150 Mass. 564. *Wheatland v. Boston*, 202 Mass. 258.

The petitioners do not deny that no such service is necessary in an appeal; but they contend that the complaint before the county commissioners or the Superior Court is not an appeal, but a new proceeding. The statute treats it as an appeal, and calls it an appeal in both sections. The procedure provided is like that of an ordinary appeal. We think it is in fact an appeal, and that no service of process upon the town is contemplated. So far as we are aware, the practice has been in accordance with this view.

In their brief the respondents have cited more than thirty cases

which have come to this court under this statute, and it is said that in all of them the record shows an entry of the appeal on the first Monday of the first month after the expiration of thirty days from the receipt of the notice from the assessors, or on a day earlier than this Monday, without the formal service of any process upon the assessors or the inhabitants of the city or town. In the cases where the entry was before the return day prescribed by the statute, either no objection was made on that account, or it was held that the irregularity was waived. See *National Bank of Commerce v. New Bedford*, 175 Mass. 257; *Brodhine v. Revere*, 182 Mass. 598. We are referred to no cases in which the practice has been such as the petitioners contend for.

Order of dismissal affirmed.

The case was submitted on briefs.

W. A. Gaston, F. E. Snow & R. M. Saltonstall, for the petitioners.

S. H. Hudson & P. Nichols, for the respondents.

HENRY J. BODEN vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 2, 1910. — May 17, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Elevated railway, Invited person, Licensee, Trespasser.

Where a corporation, which operates both an elevated railway and street railway lines, maintains a station at which cars and trains of both lines discharge and receive passengers and has provided for passengers therein a safe way of exit from its elevated trains to surface cars, it is the duty of such a passenger to use the way provided, and if, knowingly and without any invitation express or fairly to be implied from the situation and arrangement of the station and platforms, he leaves the way marked out by the carrier and proceeds to pass to a surface car by some other platform, he ceases to be a passenger and becomes a trespasser or at most a mere licensee. It makes no difference that he uses a platform where other passengers before him have gone unless there is an invitation express or implied on the part of the carrier. Following *Legge v. New York, New Haven, & Hartford Railroad*, 197 Mass. 88.

An elevated railway company in Boston, which also operated a number of street car lines upon the surface of the streets, maintained a station at which passengers leaving an elevated train could pass across a well lighted platform and down a few steps to another well lighted platform two hundred and five feet long and twenty-one feet wide, which was covered and ran parallel to a track

where surface cars discharged and received passengers. Surface cars approached this platform by passing first up an incline and around a large curve like a horseshoe. From the end of this covered platform which was adjacent to the part of the track where the track ceased to curve and came alongside of it, a narrow platform, uncovered and constructed of varying width along the curve of the track and of boards with spaces between them, was built for the use of employees of the company. It was not lighted in the evening. At a point ninety-five feet from the covered platform there was a rise of about six inches and the platform was narrowed about two feet, leaving an opening where the floor of the wider portion ceased. A passenger on an elevated train at half past ten o'clock at night passed down to the covered platform and, seeing a car which he desired to take approaching and being fearful lest, if he waited to take the car at the usual place, he would not be able to get a seat because of the number of passengers, walked out upon the narrow, unlighted, uncovered platform to a place with which he was not familiar, stepped off at the opening ninety-five feet from the passenger platform, and received injuries, to recover for which he brought an action against the elevated railway company. At the trial of the action there was evidence tending to show, besides the foregoing facts, that other persons had gone out upon the narrow platform to meet cars for the same reason that the plaintiff had. *Held*, that the plaintiff had not been invited to use the platform where he was when he was injured, that he had no right there as a passenger, but was at most a mere licensee, and that the only duty which the defendant owed to him was to refrain from wanton or reckless conduct that would put him in peril, which duty the defendant had not violated; and, *also*, that there was no evidence that the plaintiff was in the exercise of due care.

TORT for personal injuries alleged to have been received by the plaintiff on December 25, 1905, at the Dudley Street station of the defendant in Boston when with a view to getting upon a surface car before it reached the platform built for the use of passengers entering and leaving such cars, he was passing along a platform built for use of employees of the defendant. Writ dated September 7, 1906.

The case was tried before *Brown, J.* At the close of the evidence, the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. P. Thompson, for the plaintiff.

E. P. Saltonstall, (*S. H. E. Freund* with him,) for the defendant.

KNOWLTON, C. J. The plaintiff took a train on the defendant's elevated railway to the Dudley Street terminal station. There he undertook to pass by transfer to a surface car of the defendant which came into the same station. From the platform on which passengers alight from the cars on the elevated railway, there were three steps down to a covered platform from

which passengers take cars running out on some of the defendant's surface roads. This platform was two hundred and five feet long and twenty-one feet wide, and the cars from the surface roads came up a gradual ascent from the street below, and passed around a curve like that of a horseshoe, and the track extended along by the side of this platform throughout nearly its whole length. The platform was well lighted and conveniently constructed for the use of passengers, and all the surface cars stopped by the side of it to discharge and receive passengers. Extending off from this platform, adjacent to the upper part of the curve in the track for the surface cars, there was another narrow platform for the use of employees, constructed with the boards in the floor laid apart from each other, with spaces of about an inch between them, which platform was not covered, nor lighted in the evening. Its width varied greatly, as it was built around the outer edge of the curved track. At a point ninety-five feet from the side of the covered platform there was a rise of about six inches, and the platform was narrowed about two feet, leaving an opening where the floor of the wider portion ended.

The accident happened at about half past ten o'clock in the evening. The plaintiff left the elevated train, passed across the platform and down three steps to the covered platform. He wished to take a car for Mattapan. He knew the car would come around the curve and stop opposite the covered platform to receive passengers. Because he thought the number of passengers taking the car would be so large that he would not get a seat if he got upon the car in the ordinary way, he left the covered platform, and walked out into the darkness along the other platform a distance of ninety-five feet, and stepped off into the opening at the place where the platform was narrowed. The car for Mattapan which he had started to take was about fifty feet further on, around the curve. The night was dark, and the plaintiff testified that when he left the covered platform he walked "out into utter darkness." He testified that he used this station "two or three times a day, back and forth," although some days he did not "go at all." He also testified that he was not familiar with the platform near where he fell, and that he was not looking where he was stepping.

The construction of the station, with its long and wide covered platform where the surface cars discharged and received passengers, and with the platform of a different kind, uncovered and having spaces between the boards of the floor, and leading out at right angles from the covered platform into utter darkness in the evening, with cars coming up and passing around before they reached the platform designed for passengers, showed plainly that passengers were not expected to go out around the curve to meet cars coming in. There was no evidence of an invitation to passengers, express or implied, to go there. There was nothing to indicate that the platform around the curve was intended to be used by passengers leaving the cars or by passengers taking the cars. There was no evidence that any passenger ever left a car there. There was testimony that other persons, like the plaintiff, had sometimes gone out upon this platform to meet cars, with a view to increase the probability of their getting a seat, when there was a large number waiting to take the cars on the covered platform. But this was contrary to the plain indications of the purpose of the railway company. They went there, not in the exercise of their rights as passengers, but as trespassers, or at best as mere licensees.

The principle stated in *Legge v. New York, New Haven, & Hartford Railroad*, 197 Mass. 88, 90, is applicable to a passenger who knowingly disregards the provisions made for his convenience and safety, and chooses a course with which he is not familiar, and which he knows was not intended for his use. In that case, the court, in speaking of the duty of a passenger to use the proper arrangements made for his exit, said: "If he knowingly fails to do so, and without any invitation either express or fairly to be implied from the situation and arrangement of the station and grounds, leaves the way marked out by the defendant and proceeds to make his exit in some other way, he ceases from that moment to be a passenger and becomes a trespasser, or at the most a mere licensee. He has stepped from the aegis by which, up to that moment, the law as to passengers covered him. Nor does it make any difference that he goes where others, with the knowledge of the railroad company, have gone before him, unless there is some invitation express or implied upon the part

of the company. Knowledge of such use where proper arrangements have been otherwise provided does not of itself amount to such invitation." See also *Lowery v. Walker*, [1910] 1 K. B. 173. Then follows a citation of cases. The defendant was under no obligation to provide a place for passengers where the accident happened, as if they were invited to use the horseshoe platform there. Its only duty was to refrain from wanton or reckless conduct that would put them in peril.

In going where he did and as he did, the plaintiff, upon his own testimony, was not in the exercise of due care. He started to take a car which was about one hundred and fifty feet away from the lighted platform intended for passengers, and he did this on a dark night, passing over a course which was not lighted and with which he was not familiar. He did not look to see where he was stepping. He did this knowing that he was not regarding the plans and arrangements made by the defendant for the accommodation of its passengers. He did it with no other purpose than to relieve himself from the inconvenience attendant upon the presence of a large number of other passengers. He knew the principal facts which created the risks attendant upon his conduct, and these were such as should have induced him to refrain from the exposure to danger which he voluntarily accepted. We are of opinion that there was no evidence that he was in the exercise of due care.

Exceptions overruled.

**ALBERTINA STEVERMAN vs. BOSTON ELEVATED RAILWAY
COMPANY.**

CLEMENT C. STEVERMAN vs. SAME.

Suffolk. March 2, 1910. — May 17, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Street railway. Carrier. Pleading, Civil, Declaration. Actionable Tort. Damages.

At the trial of an action by a woman against a street railway company to recover for injuries alleged to have been received by the plaintiff while she was a passenger upon a closed electric car of the defendant, the plaintiff testified that, while she was sitting on a seat of the car, her ankles felt hot and, looking down,

she saw flames "gushing right out and my clothes got afire and I jumped very quickly aside . . . and in doing so I got a terrible stitch in my left side." It also appeared, that a fellow passenger quickly "clapped" out the fire in the plaintiff's clothing, and that her dress and boots were burned only slightly. The defendant introduced evidence tending to show that there was but a slight outburst of flame which caused the passengers to leave their seats only a short time, but offered no explanation of the presence of the flames. *Held*, that there was evidence which warranted the jury in finding that the presence of the flames was due to negligence for which the defendant was responsible, that the plaintiff acted reasonably in anticipating bodily injury from the flames and springing to her feet, and therefore that the injury to her side was caused by negligence for which the defendant was accountable.

In order that an action may be maintained against a carrier by a passenger who was injured while attempting to avoid what at the time appeared to the passenger to be imminent peril, it is sufficient to show that, with a reasonable anticipation of bodily injury as the situation then appeared, the passenger acted on the urgency of the moment and was hurt, although afterwards it may be plain that all danger might have been avoided by mere inaction on his part.

A declaration in an action of tort by a woman passenger against a street railway company alleged that the plaintiff "was injured through the negligence of the defendant, its agents and servants, by means of fire being set to her clothing from the electric heating apparatus of the said car, or other appurtenances of the said car, so that the plaintiff received severe injury to body and mind." The evidence of the plaintiff tended to show that, as the plaintiff sat upon a seat in the car, flames came from beneath the seat and set fire to her clothing, and that she sprang up and in doing so wrenched her side, that the injury to the clothing was slight, but that the injury to the side was severe. *Held*, that under the declaration the plaintiff could claim damages for the injury to her side.

At the trial of an action by a woman against a street railway company to recover for personal injuries alleged to have been caused by flames which came from beneath a seat of a closed electric car of the defendant upon which the plaintiff was a passenger, the plaintiff testified that, as she was sitting in the car, her ankles felt hot and, looking down, she saw flames "gushing right out and my clothes got afire and I jumped very quickly aside . . . and in doing so I got a terrible stitch in my left side." There was evidence from which the jury would have been warranted in finding that the presence of the flames in the car was due to negligence for which the defendant was responsible. The flames only slightly burned the plaintiff's clothing and in no way burned her person. The defendant asked the presiding judge to rule that "there is no evidence of physical injury," and that "the act of standing up, not accompanied with physical contact with any part of the car, is not such physical injury or battery as will warrant the submission of the case to the jury." The rulings were refused and there was a verdict for the plaintiff. *Held*, that the rulings were refused rightly, since, if the jury found, as they were warranted in finding on the evidence, that the plaintiff, acting as a reasonable person in the presence of danger, moved to one side quickly and in doing so wrenched her side and thereby suffered an external injury accompanied by a serious nervous shock causing severe pain, they might treat her injuries, in assessing damages, as the direct result of the accident.

TWO ACTIONS OF TORT. The declaration in the first action alleged that the plaintiff, a married woman, while a passenger

upon a car of the defendant, "was injured through the negligence of the defendant's agents and servants by means of fire being set to her clothing from the electrical heating apparatus of said car or through the appurtenances of said car so that the plaintiff received severe injury to body and mind." The second action was by the husband of the plaintiff in the first action to recover for loss sustained by reason of her injuries. Writs dated December 22, 1906.

The cases were tried together before *Hitchcock*, J. The plaintiff in her direct examination described the accident as follows: "I was sitting there and all of a sudden my ankles felt hot and I looked down and saw the flames gushing right out and my clothes got afire and I jumped very quickly aside and I don't know—I must have wrenched my side or got a shock of some kind but I jumped and in doing so I got a terrible stitch in my left side here. A gentleman opposite me jumped across the car and clapped the flames out. I was up then and I sat down a moment to rest. I was in a terrible nervous condition and I felt all of a tremble and I had this terrible pain all up through me and it seemed to go to my head, a kind of a clinching. They asked me to write my name. The conductor came up and I wrote 'C. Steverman' but I could n't do any more."

Other facts are stated in the opinion.

At the close of the evidence the defendant asked the presiding judge to rule as follows:

"1. On the pleadings and evidence there should be a verdict for defendant."

"3. There is no evidence of physical injury.

"4. The act of standing up, not accompanied with physical contact with any part of the car, is not such physical injury or battery as will warrant the submission of the case to the jury."

The judge refused to make any of these rulings, and ruled that "the burning of the dress would not be sufficient to allow any fright injuries," and in his charge gave to the jury among other instructions the following:

"If by the negligence of the defendant the plaintiff was put in a dangerous place and she did at that time what a reasonably prudent and careful person would do to get herself out of that

dangerous position and if her act was an act, although impulsive and somewhat unguarded, which might be a natural and reasonable consequence of the situation, and in so doing she received a physical injury by the wrench of her side or in any other way, that would be an injury for which the defendant might be responsible, if it was responsible for anything in connection with the occurrence. If there is physical injury as a result of the negligence of the defendant, and fright or nervous shock accompanies it or follows it, why then the fright or nervous shock is an element that may be taken into consideration in determining any question of damages that the plaintiff may be entitled to recover."

There were verdicts for the plaintiffs; and the defendant alleged exceptions.

The cases were submitted on briefs.

R. A. Sears & J. E. Hannigan, for the defendant.

D. H. Coakley, R. H. Sherman & W. M. Hurd, for the plaintiffs.

BRALEY, J. The defendant contends that verdicts should have been ordered in its favor as there was no proof of physical injuries received by Mrs. Steverman, to whom we shall refer as the plaintiff, or, if the evidence warranted a finding to the contrary, that the cause of action proved is not described by the allegations of the declaration.

The plaintiff having been accepted as a passenger, the defendant became bound to exercise in the management of its car the highest degree of care required by the circumstances to protect her from injury during transportation. *Marshall v. Boston & Worcester Street Railway*, 195 Mass. 284. It is not easy to suggest by way of illustration incidents arising from the manner in which a car may be operated by electricity more likely to cause passengers great apprehension of bodily harm than the situation with which the plaintiff, without warning or previous experience, was confronted. In substance, her description of what happened was uncontroverted. Upon her taking a seat the car proceeded, when, her attention having been attracted by a sensation of heat, she saw flames flash out from the part of the car where she was riding, and that her clothing had taken fire. If she at once jumped away from the danger, the jury would have been jus-

tified in finding that she acted from a natural instinct of self-preservation and that the apprehension of the peril was none the less real because after a fellow passenger "clapped" out the fire in her clothing, it appeared that her dress and boots were only slightly scorched. The defendant, while introducing testimony of a flash followed by smoke and a slight outburst of flame causing the passengers to leave their seats, which they shortly resumed after the conductor made an investigation, offered no explanation of the explosion, and the plaintiff as the evidence stood had been exposed to a sudden and grave danger, for which the defendant could be found liable. *Cassady v. Old Colony Street Railway*, 184 Mass. 156. *Gilmore v. Milford & Uxbridge Street Railway*, 193 Mass. 44. *Carroll v. Boston Elevated Railway*, 200 Mass. 527. By remaining seated, the fire might have spread to other parts of her clothing, becoming more difficult to extinguish, and even if the occurrence was of such short duration that she need not have moved, it was a question of fact whether she used ordinary precaution. It is sufficient if with a reasonable anticipation of bodily injury as the situation then appears, a passenger acts on the urgency of the moment and is hurt, although afterwards it may be plain that by mere inaction all danger would have been avoided. *Cody v. New York & New England Railroad*, 151 Mass. 462, 468. *Gannon v. New York, New Haven, & Hartford Railroad*, 173 Mass. 40, 41. *Hanley v. Boston Elevated Railway*, 201 Mass. 55, 58.

Nor was the declaration insufficient. If the plaintiff's injury was alleged to have been caused "by means of fire being set to her clothing from the electric heating apparatus of the said car, or other appurtenances of the said car," the presence of fire, from whatever source it may have sprung, preceded by an explosion, set in motion a train of uninterrupted events resulting in the plaintiff's injury. *Oulighan v. Butler*, 189 Mass. 287, 292, and cases cited. *Doe v. Boston & Worcester Street Railway*, 195 Mass. 168, 171. *Miller v. Boston & Northern Street Railway*, 197 Mass. 535, 539.

The defendant's principal argument, however, is, that the first, third and fourth requests should have been given, as there was no evidence of external physical injury. *Spade v. Lynn & Boston Railroad*, 168 Mass. 285, 290. But through the defend-

ant's negligence fire had been generated, and communicated to the plaintiff's clothing, even if it did not burn her body. It is not only an assault, but a battery by the actor, where a dangerous physical force which he has intentionally put in motion comes in contact with the clothing of the person against whom it is directed, although he may be neither bruised nor wounded. *Commonwealth v. Hagenlock*, 140 Mass. 125. *Commonwealth v. Hawkins*, 157 Mass. 551. *Respublica v. DeLongchamps*, 1 Dall. 111. *United States v. Ortega*, 4 Wash. C. C. 581. *Kirland v. State*, 48 Ind. 146. *The Queen v. Day*, 1 Cox C. C. 207. The injury to the person by the impact of force coming from without, whether intentionally or negligently inflicted, may leave no external marks of violence, while most seriously affecting health or possibly life itself. If the defendant was not bound "to anticipate, or to guard against an injurious result, which would only happen to a person of peculiar sensitiveness," it was required to protect the plaintiff from possible injuries attributable to its negligence. It is an over refinement for the defendant to urge that the plaintiff's clothing was separable from her person, and that the resulting strain and shock when she sprang to avoid an anticipated danger was not a physical injury, which if her person had been even slightly burned must have been conceded. *Cameron v. New England Telephone & Telegraph Co.* 182 Mass. 310, 312. But if the jury were satisfied from her evidence that, while making the movement, she wrenched the muscles of her side and thereby suffered an external injury accompanied with serious nervous shock, causing severe pain, they might treat her injuries, when assessing damages, as the direct result of the accident. *Warren v. Boston & Maine Railroad*, 163 Mass. 484, 487. *Gannon v. New York, New Haven, & Hartford Railroad*, 173 Mass. 40. *Berard v. Boston & Albany Railroad*, 177 Mass. 179.

The first, third and fourth requests were rightly refused, and the instructions were sufficiently favorable to the defendant.

Exceptions overruled.

THURBER I. WALKER vs. ROBERT W. WILLIAMSON & another.

Suffolk. March 2, 1910. — May 17, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Evidence, Remoteness, Opinion: experts. Practice, Civil, Conduct of trial.

In an action by a workman employed in a hat factory against his employers, for personal injuries caused by a block on which hats were piled to preserve their shape falling from a table upon the feet of the plaintiff, while in the course of his duty he was trying to take a pile of hats from the table, the jury returned a verdict for the defendants, and the plaintiff alleged exceptions to the exclusion by the presiding judge of evidence offered by the plaintiff to prove that the block had fallen in a similar way before. *Held*, that the evidence was objectionable as raising collateral issues, and properly could be excluded in the discretion of the presiding judge.

In an action by a workman employed in a hat factory against his employers, for personal injuries caused by a block on which hats were piled to preserve their shape falling from a table upon the feet of the plaintiff, while in the course of his duty he was trying to take a pile of hats from the table, the jury returned a verdict for the defendants, and the plaintiff alleged exceptions to the refusal of the presiding judge to allow the plaintiff to ask the defendants' superintendent whether the unfastened block was a dangerous appliance. *Held*, that the refusal was proper, because the question was one to be decided by the jury and was not a subject for expert testimony.

TORT for personal injuries sustained by the plaintiff while at work in the defendants' factory for making ladies' felt hats at 110 Utica Street in Boston on August 3, 1905. Writ dated September 20, 1905.

In the Superior Court the case was tried before *Pierce, J.* The manner in which the accident happened is stated in the opinion. At the close of the plaintiff's evidence the defendants rested, and the judge submitted the case to the jury with instructions which were not objected to. The jury returned a verdict for the defendants; and the plaintiff alleged exceptions, raising the questions stated in the opinion as to the exclusion of certain evidence.

The case was submitted on briefs.

F. P. Garland & E. D. Wright, for the plaintiff.

H. C. Sawyer & H. D. Hardy, for the defendants.

LORING, J. The defendants were hat manufacturers. The plaintiff was employed by them and set to work on the back of

a stamping machine. A part of his duty consisted in bringing hats from a table to the stamping machine. These hats were piled on a block on the table to preserve their shape. This block weighed some twenty pounds. The first time the plaintiff undertook to take a pile of hats from the table this block fell on his feet and this action was brought to recover for the injury so caused.

The presiding judge refused to allow the plaintiff to prove that the block had fallen in a similar way before. The evidence was objectionable as evidence raising collateral issues. It did not add anything of value to the description of the block and of its use. It could be properly excluded in the discretion of the presiding judge. *Yore v. Newton*, 194 Mass. 250.

The presiding judge also refused to allow the plaintiff to ask the defendants' superintendent whether the block unfastened was a safe appliance. This question was the question to be decided by the jury and was not the subject of expert testimony. *Meehan v. Holyoke Street Railway*, 186 Mass. 511. *Wolfe v. New Bedford Cordage Co.* 189 Mass. 591. *Whalen v. Rosnosky*, 195 Mass. 545.

Exceptions overruled.

ISRAEL NESSON vs. JOSEPH MILLEN.

SAME vs. SAME.

Suffolk. March 2, 3, 1910. — May 17, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Bills and Notes. Contract, Consideration. Estoppel.

In an action by the payee of a promissory note against an indorser of the note in blank before delivery the defendant may show that there was no consideration for his indorsement, and that, so far as the payee and himself are concerned, the note was an accommodation note.

In an action against the indorser before delivery of a promissory note secured by a mortgage on land, for the balance due on the note after the mortgage had been foreclosed under a power of sale and the proceeds of the sale had proved to be insufficient to pay the note in full, the defendant should be allowed to show that before the note was given the plaintiff agreed in writing to sell to the defendant the land on which the mortgage was foreclosed and agreed to convey the land

to him subject to a mortgage of \$10,000, but that the plaintiff was unable to carry out this agreement because there was a mortgage on the land to a bank for \$5,000 which he was unable to get discharged, that the plaintiff thereupon proposed that the defendant should take a deed, through a third person as a conduit, free and clear of all incumbrances and should cause a mortgage and a mortgage note indorsed by the defendant to be given to the plaintiff by the third person, so as to enable the plaintiff to raise money, the plaintiff agreeing to discharge the mortgage to the bank as soon as he could and not to look to the defendant for payment by reason of his indorsement on the mortgage note, the plaintiff representing to the defendant that the defendant's indorsement of the mortgage note would be for the plaintiff's accommodation, that the transaction thus proposed was carried out, and that the mortgage note sued upon was given by the third person acting as a conduit and was indorsed by the defendant pursuant to the arrangement stated, the defendant thus receiving no consideration for his indorsement and the plaintiff suffering no detriment.

In an action by the payee of a promissory note against an indorser of the note before delivery, where the defendant shows that his indorsement of the note was without consideration and for the accommodation of the plaintiff, if it appears that the defendant made certain payments of interest on the note which he was not bound to make, this does not estop or preclude him from setting up the want of consideration as a defense.

TWO ACTIONS OF CONTRACT, each upon a mortgage note, dated September 23, 1902, payable to the plaintiff, or order, and indorsed by the defendant before delivery, the declarations alleging that each note was secured by a mortgage upon real estate, and that the real estate was sold under the power of sale in the mortgage for a sum less than the amount of the note. Writs dated respectively September 14 and 17, 1908.

The defendant's answer in each case was a general denial, with averments that he indorsed the notes in question for the plaintiff's accommodation and without consideration.

In the Superior Court the cases were tried together before *Hardy, J.* The plaintiff introduced in evidence the two notes, the maker being a third person through whom the title to the mortgaged real estate was passed as a conduit, also the two mortgages, which were duly foreclosed for breach of the conditions thereof, and two deeds to the purchaser for the two parcels of real estate under powers in the mortgages.

It also appeared in evidence that the defendant had made two payments of interest on each note, the first paying the interest to February 1, 1903, and the second paying the interest to August 1, 1904, and that these payments were indorsed on both notes.

The defendant admitted that he signed his name upon the backs of the notes before delivery.

After the plaintiff rested, the defendant made the offer of proof which is stated in the opinion.

The judge excluded the evidence offered, and ordered the jury to return a verdict for the plaintiff in each of the cases. The defendant alleged exceptions.

D. Stoneman, for the defendant.

G. W. Reed, for the plaintiff.

MORTON, J. Each of these two actions is upon a mortgage note payable to the plaintiff or order and indorsed by the defendant before delivery. The actions are against the defendant as indorser, and were tried together. The defendant offered to prove that he had entered into a written agreement with the plaintiff for the purchase of the property covered by the mortgages, and that the plaintiff was to convey it to him subject to a mortgage of \$10,000; that the plaintiff was unable to carry out this agreement by reason of the fact that there was a bank mortgage of \$5,000 which he was unable to get discharged; and that he thereupon proposed to the defendant that he (the defendant) should take a deed through a conduit, free and clear of all incumbrances, and cause mortgages on the lands conveyed and mortgage notes indorsed by the defendant to be given to the plaintiff by the conduit, so as to enable the plaintiff to raise money, the plaintiff undertaking to discharge the bank mortgage as soon as he could and not to look to the defendant for payment by reason of his indorsements on the mortgage notes, and representing to the defendant that the indorsements upon the mortgage notes would be for the plaintiff's accommodation. The defendant further offered to show that the transaction was carried out as thus proposed, and that the mortgage notes in suit were given by a conduit and indorsed by the defendant pursuant to the arrangement thus entered into.

The presiding judge excluded the evidence thus offered and directed the jury to return verdicts for the plaintiff. The defendant excepted. We think that the evidence should have been admitted.

It is manifest that if the written agreement had been carried out the defendant would have been under no personal liability on account of the mortgage subject to which the premises were

to be conveyed to him. He would have been the owner of the equity of redemption, and if the conditions of the mortgage were broken the mortgagee could have foreclosed the mortgage just as he did in the case of the mortgages given to secure the notes in suit. But the defendant would not have been personally liable, as it is contended that he now is, for the difference between the amount realized from the foreclosure sale and the sum which the mortgage was given to secure. And the question is, therefore, whether the evidence that was offered and excluded would have tended to show that there was no consideration for the defendant's indorsements. If it would, then it should have been admitted; otherwise not. We assume in the plaintiff's favor, though it nowhere distinctly appears, that the bank mortgage was discharged by him. But it does not appear that under the modified agreement the defendant received any greater interest in the property conveyed than he would have received under the written agreement, or that the indorsements were made by the defendant as part of the consideration of the purchase. Neither does it appear that the plaintiff suffered any detriment. He was already bound to convey the property to the defendant, and he represented that the indorsements would be for his accommodation and benefit, making no assertion, according to the defendant's offer of evidence, that the indorsements were a part of the consideration for the purchase. We do not see, therefore, how it can be said that there was any consideration for the defendant's indorsements. The fact that the defendant subsequently paid interest on the notes when not obliged to does not estop or prevent him from setting up the want of consideration in an action against him in which the plaintiff seeks to recover on the indorsements. It is settled that as between the payee and an indorser in blank before delivery the latter may show that there was no consideration for his indorsement, and that, so far as the payee and himself are concerned, the note was an accommodation note. *Corlies v. Howe*, 11 Gray, 125. *Case v. Spaulding*, 24 Conn. 578. *Hamburger v. Miller*, 48 Md. 317. *Chaddock v. Vanness*, 6 Vroom, 517.

We think that the rule thus established applies to the cases before us.

Exceptions sustained.

**WILLIAM S. HORSMAN vs. BROCKTON AND PLYMOUTH
STREET RAILWAY COMPANY.**

CHARLES H. DAVIS vs. SAME.

Plymouth. March 8, 1910. — May 17, 1910.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & RUGG, JJ.

Negligence. Street Railway.

In an action against a street railway corporation for personal injuries from being run into by a car of the defendant, when the plaintiff was attempting to drive in a covered delivery wagon from an intersecting driveway across a single track of the defendant at the side of a road in a town, where it was necessary to cross the track to reach the main part of the road, there was evidence that for a distance of about eighty-five feet before reaching the track of the defendant the driveway by which the plaintiff was approaching the track was lined with trees and shrubbery in full foliage obstructing the view on the side from which the car was coming, but that before reaching these obstructions at least three hundred feet of the track could be seen clearly. The plaintiff, who was familiar with the vicinity, testified that at this point he leaned forward and looked down the track and saw no car, that he then sat back and drove on at a moderate rate of speed, listening for vehicles whose approach might require him to change his course until he was run into by the car of the defendant, which was moving at a high rate of speed and was sounding no gong, that in the previous summer he had worked for the defendant as a motorman and had operated electric cars over the same track, and that the rule of the railway company was for the motorman to run the cars slowly and ring the gong when approaching a driveway or crossing. The plaintiff also testified that he acted upon his judgment that if a car came along at the usual rate of speed he had ample time to get over the track. *Held*, that the question whether the plaintiff was in the exercise of due care was for the jury, who were to say whether the plaintiff was justified in assuming that he had time to cross the track in safety or whether he should have stopped and alighted to ascertain whether a car was coming before attempting to cross the track, and also were to say how far the plaintiff, from his knowledge of the defendant's method of operating its cars in reducing their speed and sounding the gong at intersecting streets and driveways, was justified in relying on an assumption that these precautions would be continued and that the motorman would not act carelessly.

In an action against a street railway corporation for personal injuries from being run into by a car of the defendant moving at a high rate of speed along a single track of the defendant at the side of a road in a town, when the plaintiff was attempting to cross the track from an intersecting driveway, if there is evidence that the car of the defendant was moving at a rate of speed forbidden by the ordinances of the town and also that the motorman was violating a rule of the defendant which required him to run the car slowly and ring the gong in approaching a driveway or crossing, there is evidence for the jury of negligence on the part of the motorman for which the defendant would be responsible.

BRALEY, J. In the first case the plaintiff sues for personal injuries caused by a collision of the defendant's car with the team which he was driving, while the second action is brought by the owner for damages to his horse and wagon. At the close of the evidence verdicts for the defendant were ordered, because the presiding judge* was of opinion as matter of law "that it appeared that at the time of the accident the plaintiff was not in the exercise of due care," and the question for decision is whether the ruling was erroneous.

It is doubtless true, as the defendant strongly urges, that since the elimination of horse cars and the substitution of electricity passengers desire rapid transportation, and for their accommodation a heavier and more expensive equipment has been provided, with increased speed. But this demand, even when properly recognized within reasonable limits, does not relieve the carrier from compliance with the law of the road, subject only to the modifications often pointed out, that the path of the car is fixed, while travellers, either on foot or in vehicles, may use the entire way so far as it has been fitted and opened for public travel. *Scannell v. Boston Elevated Railway*, 176 Mass. 170, 173. *Wright v. Boston & Northern Street Railway*, 203 Mass. 569.

Although the general rule is established, that, where a highway crosses the tracks of a steam railroad at grade and when such conduct is necessary for his safety, a traveller who neglects to take the precaution either to look or listen for approaching trains before crossing, but passes on and is injured, cannot recover because he has failed to act with ordinary prudence, this rule of conduct, which has become a rule of law, has not been applied in favor of street railway corporations in their use of the public ways. *Hennessey v. Taylor*, 189 Mass. 583. *Scannell v. Boston Elevated Railway*, 176 Mass. 170, 173. *O'Brien v. Lexington & Northern Street Railway*, ante, 182. If so applied, it would not only unduly delay traffic on the principal streets of cities and towns which generally are selected for a franchise by the company, but would render the streets extremely dangerous for the accommodation of the general public, for whose use they were primarily designed. *Common-*

* King, J.

wealth v. New York Central & Hudson River Railroad, 202 Mass. 394, 398. If companies operating interurban lines running over highways, which for long distances are not subjected to much public travel, should have the privilege of an exclusive and paramount right of way analogous to that conferred upon steam railroads, it is for the Legislature to grant the right and to define the conditions under which it shall be exercised.

The defendant in the management of the car at the time and place of the accident was required so to regulate its speed, and if necessary to sound the gong, that travellers using due care while passing upon the track from intersecting driveways or streets,* should not be imperilled by collisions. *Driscoll v. West End Street Railway*, 159 Mass. 142. *Scannell v. Boston Elevated Railway*, 176 Mass. 170, 173. *Halloran v. Worcester Consolidated Street Railway*, 192 Mass. 104. *Fallon v. Boston Elevated Railway*, 201 Mass. 179.

The plaintiff was passing down the driveway to turn into the street, when the team as it reached the track was struck by a car coming from the south. For a distance of about eighty-five feet above the track, the driveway on the south side was lined with trees and shrubbery in full foliage obstructing the view either of the track or of cars coming from that direction. But before reaching this point, at least three hundred feet of the track extending southerly from the intersection of the driveway could be clearly seen. The plaintiff in the first case, who was familiar with the vicinity, testified that at this point he leaned forward and looked down the track, but, not seeing a car he sat back and drove on at a moderate rate of speed, listening meanwhile for vehicles whose approach might require him to change

* The accident occurred at the junction of the Rutan driveway and Warren Avenue in Plymouth. A single track of the defendant runs at the side of Warren Avenue where the Rutan driveway enters it at nearly a right angle, so that immediately upon emerging from the driveway it is necessary to cross the track to get into the road. The plaintiff in the first case was driving from the Rutan driveway in an order and delivery wagon, belonging to the plaintiff in the second case, with a covered top and with sides of canvas or oiled duck. The plaintiff in the first case testified that in the summer preceding the accident he had worked for the defendant as a motorman and had operated electric cars over the same track. He testified that the rule of the railway company was for the motorman to run the cars slowly and ring the gong when approaching a driveway or crossing.

his course. If the jury believed this evidence, they could have found that a failure again to look where in passing he knew that any further observation would have been effectually prevented until he arrived so near the track that he could not turn back before being hit, was uncalled for by way of further precaution. *Kelly v. Wakefield & Stoneham Street Railway*, 179 Mass. 542. Naturally he must have been aware that cars were passing at intervals, but, whether he acted upon his judgment, as he said he did, that if a car came along at the usual rate of speed he had ample time to get over, or whether he should have stopped, alighted and ascertained, before attempting to cross, whether a car was coming, were questions of fact and not of law. *Coleman v. Lowell, Lawrence & Haverhill Street Railway*, 181 Mass. 591. *Orth v. Boston Elevated Railway*, 188 Mass. 427. *Hennessey v. Taylor*, 189 Mass. 583. *Robbins v. Dartmouth & Westport Street Railway*, 203 Mass. 546. *O'Brien v. Lexington & Northern Street Railway*, ante, 182.

In passing upon the plaintiff's conduct, his knowledge of the defendant's method of operating its cars as to speed, and sounding the gong at intersecting streets, which he testified was not rung, was relevant. If from previous experience as a motorman in its employ or as a passenger he knew that ordinarily the defendant took these precautions, how far the presumption of their continuance and the presumption that the motorman would not act carelessly should have influenced him in deciding to proceed, were questions for the jury. *Driscoll v. West End Street Railway*, 159 Mass. 142. *O'Brien v. Lexington & Northern Street Railway*, ante, 182. *Finch v. Mansfield*, 97 Mass. 89, 92.

Nor is the case at bar governed by the decision in *Ferguson v. Old Colony Street Railway*, 204 Mass. 340, on which the defendant places much reliance. In that case, the plaintiff without taking any precautions drove directly in front of an oncoming car, which by the exercise of ordinary prudence he could have seen and avoided.

We are accordingly of opinion that there must be a new trial, and, as the question of the defendant's negligence has been argued and may then be presented, it should be decided. If upon the evidence which was sufficient for the purpose the jury were satisfied that the car was moving at a rate of speed for-

bidden by the ordinances of the town, as well as in violation of the rules of the railway company, and without giving the customary signal of its approach, they would be warranted in finding that the accident was caused by the negligence of the motorman, for whose acts the defendant would be responsible. *Wright v. Malden & Melrose Railroad*, 2 Allen, 283. *Finnegan v. Winslow Skate Manuf. Co.* 189 Mass. 580, 582. *Stevens v. Boston Elevated Railway*, 184 Mass. 476. *Williamson v. Old Colony Street Railway*, 191 Mass. 144. *Beale v. Old Colony Street Railway*, 196 Mass. 119.

Exceptions sustained.

J. H. Vahey, (*P. Mansfield* with him,) for the plaintiffs.

H. F. Hurlburt, (*J. T. Connolly* with him,) for the defendant.

CHARLES E. COTTING & others, trustees, *vs.* COMMONWEALTH.

SAME *vs.* SAME.

Suffolk. March 8, 1910. — May 17, 1910.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & RUGG, JJ.

Harbor and Land Commissioners. Commonwealth Flats. Commonwealth. Deed, Covenant of warranty. Sewer. Tax, Sewer assessment. Constitutional Law. Statute, Unconstitutionality of part of statute. Contract, Construction, Performance and breach. Equity Jurisdiction, Of suits against Commonwealth.

Under R. L. c. 96, § 3, formerly Pub. Sts. c. 19, § 3, which provides that the board of harbor and land commissioners "may make contracts for the improvement, filling, sale, use or other disposition of the lands at and near South Boston known as the Commonwealth Flats," and that "all conveyances, contracts and leases made under the provisions of this section shall be subject to the approval of the Governor and Council," such board has the power to make in a deed of a parcel of land included in the Commonwealth Flats covenants of seisin, that the land is free from incumbrances, of right to convey and of warranty.

In January, 1899, the board of harbor and land commissioners, acting under the authority conferred upon them by Pub. Sts. c. 19, § 3, made a contract in writing to sell and convey to a certain person a parcel of land included within the Commonwealth Flats. In November, 1899, the city of Boston ordered the construction of a main sewer in a street abutting on the premises agreed to be conveyed. In November, 1901, the land was conveyed pursuant to the agreement by the board of harbor and land commissioners acting on behalf of the Commonwealth, the deed containing covenants of warranty and that the land was free

from incumbrances. On December 1, 1902, the city of Boston levied an assessment for the construction of the sewer, which the grantee in the deed was obliged to pay. *Held*, that, although the construction of the sewer and the assessment therefor were not made until after the deed was executed and delivered, the fact, that the order for the construction was made before the deed, created a liability which was sure to become absolute and enforceable against the land as soon as the work was completed and the expense ascertained and the Commonwealth had parted with its title, which liability constituted a breach of the covenant of freedom from incumbrances; and also, that under the covenant of warranty the Commonwealth was bound to relieve the grantee from the charge upon the land, and that its failure to do so was a breach of that covenant.

Section 4 of St. 1892, c. 402, which provides that when an assessment for the cost of a sewer in the city of Boston "is made for a parcel of land for which the owner is by law exempt from being taxed," the collection of the assessment shall be suspended, but "after the day on which the parcel ceases to be owned by a person or corporation so exempt" the assessment "shall be collected as if that day were the date of the passage of the . . . order for making the sewer," does not apply until an assessment has been made; and therefore did not suspend the creation of an incumbrance created by an order of the city of Boston for the construction of a sewer on a portion of the Commonwealth Flats, which order was made while the portion of the flats in question was owned by the Commonwealth, nor cause the effect of the order not to be an incumbrance at the time of a conveyance made by the Commonwealth after the order for construction but before an assessment for the cost of the sewer was laid.

There may be a question whether St. 1892, c. 402, § 4, which provides that when an assessment for the construction of a sewer in the city of Boston "is made for a parcel of land for which the owner is by law exempt from being taxed," the collection of the assessment shall be suspended, but, "after the day on which the parcel ceases to be owned by a person or corporation so exempt," the assessment "shall be collected as if that day were the date of the passage of the . . . order for making the sewer," should be treated as separable from other sections of the same statute which have been declared unconstitutional, per KNOWLTON, C. J.

The board of harbor and land commissioners in a bond for a deed agreed on January 10, 1899, to execute and deliver to a certain person a "warranty deed or deeds" of a part of the Commonwealth Flats in South Boston bounded by Summer Street extension, E Street, Fargo Street and D Street. On January 17, 1899, with the approval of the Governor and Council, the board made with the prospective purchaser a supplemental agreement in which it was recited that the contract for the sale of the premises was "made with the expectation on their part that Fargo and E Streets will be forthwith constructed, paved, sewered and sidewalks laid without expense to the purchasers," and in which was the following language: "We agree to use our best efforts during our continuance as members of the board of harbor and land commissioners to have such work done at an early date, either by the city of Boston, by the Commonwealth, or otherwise, without expense to the purchasers." On November 26, 1901, the land was conveyed by the board on behalf of the Commonwealth to the purchaser by a deed containing covenants that the land was free from incumbrances, and of warranty. On December 16, 1901, the city of Boston ordered the construction of certain inlet and connecting sewers joining to a sewer previously constructed in E Street. On October 7, 1904, an assessment was made therefor to be paid in ten yearly payments. Upon the first assessment becoming due and the Common-

wealth refusing to pay it, the purchaser by a bill in equity in the Superior Court sought to have it adjudged that the Commonwealth should pay the assessment, and to have the Commonwealth ordered to do so and also to pay all payments to become due in the future. *Held*, that, the order for the inlet and connecting sewers not having been made until after the delivery of the deed, the Commonwealth was under no obligation to pay the assessment by reason of the covenants therein; and that neither in the bond for the deed nor in the agreement supplemental thereto was there any express agreement to pay the tax; and therefore that the suit could not be maintained, even if, under the provisions of R. L. c. 201, relating to suits against the Commonwealth, the court had jurisdiction to entertain it, which was not decided.

KNOWLTON, C. J. These two cases, one at law and the other in equity, brought under the R. L. c. 201 and the acts in amendment thereof, were heard together to determine, as the principal question, whether the Commonwealth, either upon its preliminary contracts or upon covenants in its deeds, was bound to protect the plaintiffs from a liability for an assessment for a part of the cost of certain sewers on lands conveyed to them by the Commonwealth.* The action at law is to recover the amount paid by the plaintiffs in discharge of an assessment upon land conveyed to them by a deed of the board of harbor and land commissioners, bearing date November 26, 1901. The deed was made in pursuance of a previous contract contained in a bond signed by the members of the board, dated January 10, 1899, to execute and deliver to the plaintiffs a "warranty deed or deeds" of a part of the Commonwealth Flats in South Boston. On January 17, 1899, a supplemental agreement was executed by the members of the board, with the approval of the Governor and Council, in which it was recited that the contract for the sale of the premises was "made with the expectation on their part that Fargo and E Streets will be forthwith constructed, paved, sewered and sidewalks laid without expense to the purchasers." It also contained the following language: "We agree

* The land was described in the deed as "a parcel of land in Boston in the County of Suffolk in said Commonwealth, being a part of the land known as the Commonwealth Flats at South Boston and bounded and described as follows: northeasterly by the side line of Summer Street extension, so called, 838.98 feet; southerly by the side line of E Street 405.92 feet; southwesterly by the side line of Fargo Street 538.66 feet; northwesterly by the side line of D Street 272.67 feet, as shown in a plan thereof annexed hereto, containing 188.126 square feet of land."

to use our best efforts during our continuance as members of the board of harbor and land commissioners to have such work done at an early date, either by the city of Boston, by the Commonwealth, or otherwise, without expense to the purchasers." The deed above referred to contained general covenants "of seisin, against incumbrances, of right to convey and of warranty." It in terms granted "the right, as appurtenant to said premises and each and every part thereof, to use said streets and the sewers therein for all purposes for which public highways and sewers may be lawfully used." One of the streets referred to was E Street.

On November 29, 1899, the city of Boston ordered the construction of a main sewer in E Street, abutting on said premises, and on December 1, 1902, levied an assessment therefor, which the plaintiffs have been obliged to pay. The first question raised by the defendant is whether the Commonwealth was bound by the covenants in the deed.

The authority of the board of harbor and land commissioners relative to this subject was very broad. It is found in Pub. Sta. c. 19, § 3, in part in these words: "Said board may make contracts for the improvement, filling, sale, use, or other disposition of the lands at and near South Boston known as the Commonwealth Flats at South Boston. . . . All conveyances and contracts made under authority of this section shall be subject to the approval of the Governor and Council." This clearly includes a right to make conveyances. In making contracts for sale, the board plainly would have a right to make reasonable stipulations in regard to the cost of contemplated sewers assessable on the land, and, in a deed of conveyance, to insert reasonable covenants touching this subject. Similar contracts or covenants in similar cases have been approved by this court. *Bronson v. Coffin*, 118 Mass. 156. *Boston Molasses Co. v. Commonwealth*, 193 Mass. 387. *Corcoran v. Boston*, 185 Mass. 325. See also as to the general principle, *Peters v. Farnsworth*, 15 Vt. 155; *Schultz v. Griffin*, 121 N. Y. 294; *Vanada v. Hopkins*, 1 J. J. Marsh. 285, 293. We are of opinion that the covenants in the deed were authorized by the statute.

The next questions are whether the liability to assessment for a sewer, the construction of which had been ordered previously,

is a breach of the covenant of freedom from incumbrances in a deed, and whether the failure to protect the grantee from an assessment afterwards made upon the land, to pay the cost of construction of such a sewer, is a breach of the covenant of warranty. It is plain under our decisions that, if the grantor had been an individual owner whose land was liable to assessment, such an assessment would be an incumbrance, even though the construction of the sewer and the assessment for it were not until afterward. *Carr v. Dooley*, 119 Mass. 294. See also *Hutchins v. Moody*, 30 Vt. 655; 34 Vt. 433; *Peters v. Myers*, 22 Wis. 602. We may assume that, under our decisions, no assessment could be enforced against the Commonwealth so long as it held the title. *Corcoran v. Boston*, 185 Mass. 825; 193 Mass. 586. *Worcester County v. Worcester*, 116 Mass. 193, 194. *Boston v. Boston & Albany Railroad*, 170 Mass. 95. But this would not invalidate an assessment made for construction completed after the title had passed to a private person. The condition when the plaintiffs took their deeds was that this land was subject to an assessment as soon as it came into the plaintiffs' hands, under an order for a sewer which had been passed previously. There was a liability which was sure to become absolute and enforceable against the land as soon as the work was completed and the expense ascertained. This was an incumbrance from which the plaintiffs were entitled to be protected under the covenant.

It is even more plain that, under the covenant of warranty, the Commonwealth is bound to relieve the plaintiffs from this charge upon their land. *Hill v. Bacon*, 110 Mass. 387.

We do not find it necessary to determine whether, under the St. 1892, c. 402, § 4, the same result would be reached in reference to the covenants against incumbrances.* See *Boston v. Boston & Albany Railroad*, 170 Mass. 95, 102. This statute has been held unconstitutional in some of its provisions (see

* The Commonwealth had argued that "if the order for the construction of the sewer became an incumbrance by virtue of St. 1892, c. 402, § 4, it did not become an incumbrance until the deed from the Commonwealth to the plaintiffs took effect, and therefore was not a breach of the covenants in such deed."

Weed v. Mayor & Aldermen of Boston, 172 Mass. 28), and there may be a question whether this section should be treated as separable from the others, and valid.

For the reasons above stated, the plaintiffs are entitled to an adjudication against the Commonwealth for the amount agreed upon in the statement of facts on file.

The suit in equity relates to an assessment under an order, made on December 16, 1901, for the construction of certain inlet or connecting sewers, which assessment was made on October 7, 1904. The plaintiffs rely upon the same deed and contracts as in the other case. This assessment is not within the covenants contained in the deed, because it is founded on an order for the construction of sewers, not made until after the deed was given. When the deed was delivered there was no order or proceeding that created a liability to an assessment for these inlet or connecting sewers, and there was therefore no incumbrance, and no lawful claim or demand on this account to which the covenant of warranty could apply.

The plaintiffs seek to support their claim under the bond for a deed and the supplemental writing. In the bond there is no express agreement covering an assessment for the construction of sewers. There is a recital that the obligees have "agreed to pay all lawful taxes and assessments, if any, levied on the premises, except those for laying out and paving streets and sidewalks and building sewers," etc. These, being left without any agreement, rest where the law puts them. The obligees cannot found a liability upon this absence of a stipulation.

The supplemental agreement does not go far enough to create an obligation. As to Fargo and E Streets, there was a statement of an expectation that they would be forthwith provided with sewers without expense to the purchasers. There was no undertaking in regard to it. There was also an agreement of the members of the board to use their best efforts to have the work done at an early day without expense to the purchasers. There was no contract to save the purchasers from this expense, and there is nothing to show that their agreement was not performed. Moreover, these provisions relate only to Fargo and E Streets, and not to the inlet and connecting sewers.

There is nothing in any of the papers that creates a liability

on the part of the Commonwealth to pay the assessments referred to in the bill in equity.

Although no question of jurisdiction was raised by the pleadings, the Commonwealth, in its brief, contends that the R. L. c. 201, under which this bill is brought, is not broad enough to confer jurisdiction in equity to grant relief of the kind sought by these plaintiffs.* As we hold that the case is not established on the merits, we do not find it necessary to consider this question.

Adjudication for the plaintiffs in the first case; in the second case, bill dismissed.

The cases were submitted on briefs.

C. H. Tyler, O. D. Young & B. E. Eames, for plaintiffs.

D. Malone, Attorney General, & F. T. Field, Assistant Attorney General, for the Commonwealth.

OLD COLONY STREET RAILWAY COMPANY vs. S. LOUISE
THOMAS & another.

SAME vs. THEODORE B. THOMAS & another.

Norfolk. March 8, 1910. — May 17, 1910.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & RUGG, JJ.

Practice, Civil, Exceptions. Superior Court. Land Court, Appeal. Evidence, Presumptions and burden of proof. Clerk of Courts.

Where a judge of the Superior Court, in a case which has been appealed to the Superior Court from the Land Court, has ordered that the respondent, who has alleged exceptions to certain rulings made in the Superior Court and whose ex-

* It was averred in the bill that the Commonwealth had refused to pay the amount of the assessment, that the collector of taxes of the city of Boston had sent to the plaintiffs bills for the amount of the first yearly apportionment thereof (the total amount of the assessment having been apportioned into ten payments) and, on information and belief, that the collector intended to proceed forthwith against the plaintiffs to enforce payment of the amount then due. The prayers of the bill were for an adjudication that the Commonwealth should pay the entire assessment, and should be ordered to pay the amount then due and further amounts as they became due.

ceptions have been allowed, shall enter his exceptions in this court on or before a certain day and that, if they are not so entered, the exceptions "shall thereupon be overruled and the rulings and orders excepted to affirmed unless the court, for good reason, extends the time," and the respondent, without procuring any extension of time, fails to comply with the order, and, upon his entering the exceptions in this court two days late, this court upon motion of the petitioner dismisses the exceptions, the case is still pending in the Superior Court, which still may revoke its former order and extend the time within which the exceptions must be entered in this court, and the petitioner has not an absolute right to have a motion allowed that "the final decision of" the Superior Court be "certified to the Land Court," there not having been any final decision.

A report filed by a judge of the Land Court, on an appeal by a respondent from a decree granting a petition for the registration of the title to certain flats, stated: "From a study of the report of the official examiner . . . I found good record title in the petitioner. . . . The matter set forth in the issues on this appeal was not presented before me otherwise than as it might appear from the deeds in the chain of the petitioner's record title and from the answers filed by the respondent. As to the latter, the case had been specially assigned for trial and the respondent had defaulted. As to the former, I found, from an examination of the records submitted to me, title in the petitioner as above stated." *Held*, that, under the circumstances of the default of the respondent, the report was sufficient under St. 1905, c. 288, which required of the judge "a full report of his decision and of the facts found by him so far as they relate to or bear upon any questions involved in the appeal."

Under St. 1905, c. 288, which requires a judge of the Land Court, where an appeal is taken from that court to the Superior Court, to file in the Superior Court "a full report of his decision and of the facts found by him so far as they relate to or bear upon any questions involved in the appeal," the judge is not obliged to make specific findings upon issues framed for the Superior Court, because such issues are framed after the findings are made.

The official act of a judge of the Land Court in framing issues for the Superior Court upon an appeal to that court for a jury trial on the facts, establishes *prima facie* the proposition that such issues are pertinent and ought to be tried.

In determining whether issues, which were framed by a judge of the Land Court upon an appeal, by the respondent in a petition for the registration of the title to certain land, to the Superior Court for a jury trial on the facts, are material to the case, or whether an exception by the respondent to an order of the Superior Court allowing a motion of the petitioner that the appeal be dismissed because the issues were not material should be sustained, this court cannot consider matters in a decision and report made by the judge of the Land Court in granting another petition by the same petitioner for the registration of land contiguous to that described in the first petition, although such decision and report are a part of the same bill of exceptions in this court.

The only place for making a record or for keeping a record of a case in the Superior Court is in the clerk's office, except as such records may be made or kept for the time being in a place where the court is sitting.

Where one, who has claimed an appeal to the Superior Court from a decree of a judge of the Land Court, after the office hours of the clerk of the Superior Court on the thirtieth day after the date of such decree, leaves with an assistant clerk of the court at his house and not at the clerk's office the papers which, by R. L. c. 128, § 13, he should file within thirty days after the date of the decree, and on the next day the assistant clerk takes the papers to the office of the clerk and

enters them there, dating the entry on the docket as of the day on which he received them at his house, there is no entry of the appeal in the Superior Court within thirty days after the decree, and therefore the record made by the assistant clerk should be amended and the appeal should be dismissed.

TWO PETITIONS, filed in the Land Court on January 22, 1904, and on February 4, 1907, respectively, for the registration of the title to certain contiguous parcels of land and flats in Quincy.

In the first case, after a general default had been entered by the Land Court on February 16, 1906, as to "all parties defendant, whether named in the notes or not who have not appeared or answered," Theodore B. and S. Louise Thomas on November 30, 1906, with the consent of the petitioners filed separate answers. The case was expressly assigned by the Land Court for a trial on June 6, 1907, and the respondents then were defaulted and a decree of confirmation and registration of title in the petitioner was entered on June 19, 1907, from which the respondents Thomas appealed to the Superior Court. The judge of the Land Court framed issues for the trial in the Superior Court and also filed a report of his findings. On October 15, 1908, the petitioner filed in the Superior Court the motion to dismiss the respondents' appeal from the decree of the Land Court, which is described in the opinion. The motion was heard and allowed by *Crosby, J.*; and the respondents alleged exceptions.

In the second case, there was a full hearing on the merits in the Land Court and a decree for the petitioner on January 15, 1908, from which the respondents Theodore B. and S. Louise Thomas claimed an appeal to the Superior Court. According to the docket of the clerk of the Superior Court for the county of Norfolk, the appeal papers were filed in the clerk's office on February 14, 1908. The petitioner moved to dismiss the appeal on the ground that it was not entered within thirty days after the decision appealed from, and also moved that the record of the clerk of courts be corrected, because the appeal papers were not entered in the clerk's office until February 15, 1908. Attached to the latter motion was an affidavit of Robert B. Worthington, assistant clerk of courts for the county of Norfolk, in which he stated: "In the evening of February 14, 1908, after the office of the clerk of courts for the county of Norfolk was

closed, somebody, I don't know who it was, in behalf of Harvey H. Pratt [attorney for the respondents], came to my house with certain papers now on file in this court under said number. This was, I think, while I was at my evening meal, and was, I should say, about seven o'clock in the evening. At the same time he gave me the entry fee of \$3. I received the papers and the money, and, the next morning, took them to the office of the clerk of courts in Dedham, and entered said papers, . . . stamping them as of the previous day. These papers are now included in the papers in said case. The office of the clerk of courts of said county closes at 5 P. M." At the hearing on the motions by *Crosby, J.*, the petitioner offered to prove the facts stated in the affidavit, but the judge refused to admit the evidence and denied both motions. The petitioner appealed.

In the second case as in the first, the petitioner filed in the Superior Court a further motion to dismiss the appeal from the Land Court on grounds similar to those stated in the opinion as to the first case. The motion was heard by *Crosby, J.*, and allowed; and the respondents alleged exceptions.

The respondents having delayed entering in this court their exceptions to the order of the Superior Court dismissing their appeals from the decisions of the Land Court in the two cases, on motion of the petitioner it was ordered that the exceptions be entered in this court on or before January 1, 1910, and, if they were not so entered, that the exceptions "shall thereupon be overruled and the rulings and orders excepted to affirmed unless the court, for good reason, extends the time." The respondents did not enter their exceptions in this court until January 3, 1910, and, on motion of the petitioner, this court dismissed the exceptions. The petitioner thereupon moved in each case that, the order as to the entry of the exceptions on or before January 1, 1910, not having been complied with, "the final decision of" the Superior Court "be certified to the Land Court," and the respondents moved in each case that the order as to the entry of their exceptions on or before January 1, 1910, be revoked and that the time for such entry be extended to and including January 24, 1910. The petitioner's motions were denied and the respondents' motions were allowed by *Pierce, J.*; and the petitioner appealed.

H. H. Pratt, for the respondents.

Asa P. French, (*W. A. Rollins* with him,) for the petitioner.

KNOWLTON, C. J. These are appeals and exceptions in two cases brought in the Land Court for the registration of titles. We will consider first the appeal in each case from the order of the Superior Court, made on January 21, 1910, revoking an order of November 29, 1909, that the exceptions be entered in the Supreme Judicial Court on or before January 1, 1910, and in default thereof that they be overruled and the rulings and orders excepted to affirmed, unless the court, for good reason, should extend the time. The respondents having failed to enter the exceptions within the time prescribed, and having entered them afterward without a further order, they were dismissed upon motion by the Supreme Judicial Court. Thereupon the petitioner filed in each case a motion that the final decision be certified to the Land Court, and the respondents filed a motion that the order of November 29 be revoked, and the time for entering the exceptions be extended. The court denied the former and allowed the latter of these motions, and the petitioner appealed in each case.

The cases were pending in the Superior Court after the order of the Supreme Judicial Court dismissing the exceptions. No final judgment or order had been entered in the Superior Court in pursuance of the order of November 29, and the cases were there for disposition. It was therefore in the power of the Superior Court to deal with them in any proper way, and to revoke the former order if good reason was shown for so doing. The appeal is not well founded, and the last order of the Superior Court is affirmed.

In the first of these cases there was a decision in favor of the petitioner and an order for the registration of the title in the Land Court, from which the respondents appealed to the Superior Court. Issues were framed by the Land Court for trial in the Superior Court, as required by the statute. The petitioner filed in the Superior Court a motion for the dismissal of the appeal, which was allowed, and exceptions were taken from the order of dismissal. The reasons for the motion to dismiss were stated therein as follows:

"First, because the report of the judge of the Land Court is

not a full report of the facts found by him so far as they relate to, or bear upon, any questions involved in this appeal, and does not comply with the requirements of St. 1905, c. 288, and the petitioner is thereby deprived of the benefit of the presumption in its favor which the statute undertakes to secure to it.

"Second, because the judge of the Land Court has made no specific finding upon the issues, or either of them, framed for this court upon this appeal.

"Third, because it does not appear that the issues framed for the jury in this court were material to the decision of the Land Court, from which this appeal was taken.

"Fourth, because there was no trial in the Land Court upon the facts.

"Fifth, because it does not appear that the decision of the Land Court was based upon any disputed issue of fact.

"Sixth, because it appears that the decision of the Land Court was based upon a question of law, and not of fact.

"Seventh, because it appears that the decision of the Land Court was based solely upon an inspection of the record title to the land described in the petition, and involved only the construction of the conveyances and other instruments forming the chain of that title, and that error, if any, in said decision of the Land Court, was error of law and not of fact, the remedy for which is by appeal or exceptions to the Supreme Judicial Court, and not by appeal to this court."

The report of the judge of the Land Court * states briefly the

* The report of the judge of the Land Court stated: "From a study of the report of the official examiner, consisting of an abstract of what he reported to be the entire record title to the premises since 1808, I found good record title in the petitioner, with the boundary lines over the flats running in continuance of the boundary lines on the upland protracted to low water mark, and subject only to a mortgage to the Old Colony Trust Company, to the rights of the public below high water mark, and to certain attachments, and ordered a decree accordingly which was subsequently entered.

"The matter set forth in the issues on this appeal was not presented before me otherwise than as it might appear from the deeds in the chain of the petitioner's record title and from the answers filed by the respondents. As to the latter, the case had been specially assigned for trial and the respondents had defaulted. As to the former, I found, from an examination of the records submitted to me, title in the petitioner as above stated."

important matters that occurred at the hearing before him, and it is sufficient under the statute. The facts that the respondents had been twice defaulted before him, and that they failed to offer evidence of the matters averred in their answers, are reasons why the report does not deal with the issues in such detail as it otherwise would. The first reason stated in the motion is insufficient.

The judge was not obliged to make specific findings upon the issues framed for the Superior Court, as it is assumed in the second reason that he was. The issues were not framed until after his findings had been made.

To the third, fourth, fifth, sixth and seventh of the reasons, the answer is that the judge framed issues for the Superior Court, and this official act establishes *prima facie* the proposition that they are pertinent and ought to be tried. In this record there is nothing to show that they were not material to the decision of the judge, nor that his decision was not founded in part upon questions of fact. It is to be assumed that all material facts were considered and passed upon in the Land Court.

In the long and elaborate decision and in the report in the second case there are statements which make it seem probable that these issues are immaterial, and that the answers to them would not affect the decision of the Land Court in this first case, which, except in the particulars referred to in these issues, is not appealed from. But the decision and the report in that case, although founded in part upon the same facts as the decision in this, are not a part of the record in this first case, and cannot be considered in the decision of it. It follows that the judge of the Superior Court was wrong in dismissing this appeal, upon the record before him, and the exception to his order must be sustained.

In the second case a bill of exceptions was filed by the petitioner, founded on the adverse decision of the judge upon its motion in the Superior Court to prove facts and to have the record amended, and to dismiss the respondents' appeal because it was not entered within the time prescribed by the statute. It appears upon the affidavit of the assistant clerk of the Superior Court — and the petitioner offered proof of these facts — that the appeal papers, which were to be filed on February 14, 1908,

were taken to the house of the assistant clerk in the evening of that day, and handed to him there, and were not taken to the clerk's office until February 15, when they were marked as entered on February 14. The principal question raised by these exceptions is whether it is an entry of an appeal in the Superior Court, within the meaning of the statute, to hand the papers to the clerk of the court, or to any one of the assistant clerks, when he is away from the clerk's office, at any place where he happens to be found within the county. Entries of different appeals might be made in different remote parts of the county at the same time, if the papers were handed to the clerk and to different assistant clerks who were found in these places, and some of them might not appear of record for days afterward, if it happened to suit the convenience of one or more of these officers to remain away for a considerable time. The appeal is to be "entered within thirty days, . . . and upon the entry of the appeal the appellant shall file in the Superior Court copies of all material papers in the case, certified by the recorder." R. L. c. 128, § 13. The appeal is to the Superior Court, and is to be entered in that court. This plainly appears from the language of this section, from the St. 1905, c. 288, and from other parts of the statutes.

What is it to enter an appeal in the Superior Court and to file all material papers in that court? It cannot be less than to make the appeal and the papers a matter of record in the court. On the entry of the appeal the suit is pending in the appellate court. Every case pending there should be a matter of record from the moment of its inception in that court. The only place for making a record or for keeping a record of a case in the Superior Court is in the clerk's office, except as such records may be made in the court and kept for the time being in the court, when it is actually sitting elsewhere. "If the appellant does not duly prosecute his appeal within the time limited, the original order, decision or decree shall stand as if no appeal had been taken." R. L. c. 128, § 15. Suppose that, immediately after the expiration of the time limited, action is proposed to be taken upon the original decision or decree. How can it be determined whether the appeal has been prosecuted, except by an examination of the record in the clerk's office? If the papers are in the

pocket of the clerk or one of the assistant clerks to whom they were handed, and if they never have been entered upon the records in the clerk's office, shall it be said that the appeal has been prosecuted within the meaning of the statute?

In the *Estate of Giovanni Sbarboro*, 63 Cal. 5, the question was whether a petition to revoke the probate of a will was seasonably filed. It was delivered to the judge at his private residence on the last day of the year allowed by the statute. The next morning he took it to the office of the clerk and directed him to file it as of the day before. It was held that, "as the petition had not been filed in the court within the year, it was too late to file it at all." A part of the decision in *Edwards v. Grand*, 121 Cal. 254, is said in the headnote to be, that "Delivery of an instrument to the proper officer at a place other than the office where it is required to be filed is not sufficient, even though the officer should indorse it as properly filed." See *Schulte v. First National Bank of Minneapolis*, 34 Minn. 48. Under recording acts, it is generally, and so far as we know universally, held that the instrument must be delivered at the recording office, and that delivery elsewhere will not constitute a record, even though the officer indorses it as filed at the time of delivery. See cases cited in 24 Am. & Eng. Encyc. of Law, (2d ed.) 99. We are of opinion that an entry of an appeal in the Superior Court, especially where there is a particular requirement that the papers must be filed in that court, means an entry with the proper officer of the court in the place where its records are kept, so that, if the clerk does his duty, it will immediately appear upon the records of the court that the entry has been made. We are of opinion that the receipt of the papers by the clerk or an assistant clerk of the court at his place of residence, at a distance from the office where the records of the court are made and kept, is not an entry in court, and that leaving the papers there, whatever indorsement the clerk puts upon them, is not a filing of them in the court. Most of the reasons of the rule relative to ordinary recording offices apply as well to such a filing and such records in the Superior Court. See *Cheney v. Assessors of Dover*, ante, 501, relative to the entry of an appeal from an application to the assessors for an abatement of a tax, and *Orne v. Barstow*, 175 Mass. 193. We are of opinion that

this interpretation of the law will better protect the rights and interests of the people than a rule that would make a delivery of papers to an officer of the court at a place far away from the court, or from his office, an entry of an appeal in the court, and the filing of the papers in the court.

The provision of the R. L. c. 159, § 18, that "For hearings, and for making, entering and modifying orders and decrees in equity causes, by one justice, and for issuing writs in such causes, the courts shall always be open in every county, except on legal holidays," does not mean that there is a court which is open wherever a clerk or assistant clerk happens to be found, without the presence of any justice. It has no application to the question before us.

It is important to the rights of parties that such provisions of statutes should be strictly observed. *Bergen v. Jones*, 4 Met. 371, 377. *Bartlett v. Slater*, 183 Mass. 152, 153. *Briggs v. Barker*, 145 Mass. 287. *Snow v. Dyer*, 178 Mass. 393. *De Bang v. Scripture*, 168 Mass. 91.

Under the statute and the above decisions it is plain that, if the delivery of the papers to the assistant clerk at his residence, in the evening, was not an entry of the appeal in court and a filing of the papers in court, the evidence should have been received, the record amended, and the appeal dismissed as entered too late. We are of opinion that these exceptions of the petitioner should be sustained.

The parties have argued fully the respondents' exceptions in the second case, which present for our consideration the question whether the appeal was rightly dismissed for the reasons given. This bill of exceptions deals with the merits, and as we are of opinion that a proper consideration of it shows that the respondents could not have prevailed if the exceptions had been entered seasonably, we are inclined to discuss it briefly. One of its statements is in these words: "It was admitted that the only point raised by the issues framed by the Land Court in both cases was the location of the Vinal-Jenkins line, so-called." We infer that the issues in this case were dismissed on the ground that they were immaterial to the decision. This decision recites, as does also the report of the judge of the Land Court, referring to the description in the deed from the Riddle heirs to Newcomb,

that "the controversy is not really material, however, because the boundary lines now in question were settled by subsequent deeds." In referring to the ingenuity of the parties in supporting opposing theories as to the location of boundaries in the old deeds, including the deed from Vinal to Jenkins in 1806, in which the Vinal-Jenkins line, so called, first appears, the judge says, in his decision, "However interesting, this does not seem to me to be either profitable or necessary because the later dealings of the parties settled the whole matter." The case deals with a large number of deeds of different lots, covering a period of more than one hundred years, conveying flats as well as upland, sometimes referring to plans that have been lost, and running lines, and referring to monuments which were not visibly marked. It is impossible now to locate some of these lines and boundaries with accuracy. The judge has made his decision depend upon the construction of two mortgages which were foreclosed, and through which the petitioner derives its title. One of these mortgages was made in 1854 and the other in 1876. The ruling as to the construction of these mortgages and the finding as to what passed under them, on which the decision depends, were not appealed from, either as to the law or the facts. While the matter upon this record may not be entirely clear, as we understand it, the finding of the jury as to the location of the Vinal-Jenkins line under the deed of 1806, if made and reported back to the Land Court, would have no bearing upon the decision, which rests entirely on the construction of the two mortgages. Were we to pass upon this bill of exceptions in the second case, the decision of the Superior Court in dismissing the appeal on the ground that the issues were immaterial, would seem to be correct. But our decision, sustaining the exceptions to the exclusion of evidence as to the time of the entry of the appeal and the filing of the papers, requires that the appeal in this case be dismissed as not seasonably entered.

Last order of the Superior Court affirmed; exceptions to the order dismissing the appeal in the first case sustained; exceptions to the order excluding evidence that the appeal in the second case was not seasonably entered sustained.

EDWARD P. LURY vs. NEW YORK, NEW HAVEN, AND
HARTFORD RAILROAD COMPANY.

Middlesex. March 15, 1910. — May 17, 1910.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, Employer's liability. Railroad. Practice, Civil, Conduct of trial, Exceptions. Evidence, As to appreciation of danger.

In an action against a railroad corporation for personal injuries, sustained while in the employ of the defendant as a night conductor in one of the defendant's freight yards, alleged to have been caused by the negligence of a day conductor of the defendant employed in the same yard when in charge or control of a train of the defendant, there was evidence for the plaintiff that, soon after 7.35 o'clock on a dark evening in April, the plaintiff in accordance with his duty and custom made an inspection of the tracks at the southerly end of the yard and ascertained that no cars were so near any adjoining track as to be struck by cars in motion upon it, and that on track number 4 there was room for three or more cars, that a few minutes later he boarded a locomotive, of which he had charge, and went to the northerly end of the yard, where the day conductor was at work with a switching engine and crew, that the day conductor said that he only had two or three more switches to make, after which he was going to the roundhouse at the southerly end of the yard, and should stop work for the day, that thereupon the plaintiff told him that they were making up a train on track number 6 in the southerly end of the yard and told him to look out for them if he was to use any of those tracks which had switches to reach tracks 4 and 6 and others, that to this the day conductor replied that he would look out for them, that it was the duty of the day conductor to see that no cars which were moved under his orders were left where they could not clear cars moving on adjoining tracks, that there was a custom in the yard when a car was so placed that it would be struck by a car running on another track "to notify anybody that would be liable to use that end of the yard," that no such notification was received by the plaintiff, that by eight o'clock the day conductor had stopped work and his switching engine was put up for the night, that the plaintiff and his crew did not go upon track number 4, but that at 8.15 P. M., when going from the southerly end of the yard to track number 6, they came in collision with cars left on track number 4, and the plaintiff was injured. The plaintiff on cross-examination testified that it was his business "to know that the cars cleared before" he "made a single switching movement." The locomotives in charge respectively of the plaintiff and of the day conductor were the only ones in use in the yard that night. *Held*, that, although it was the plaintiff's duty to know that the tracks were clear, it could not be ruled as matter of law that he was wanting in ordinary prudence in relying on his inspection made about half an hour earlier, when he had found that their condition was safe, and that the question of the due care of the plaintiff was for the jury. *Held, also*, that there was evidence from which negligence on the part of the day conductor might be inferred, and that the question of his negligence was for the jury.

Where, at the trial of an action of tort for personal injuries, the plaintiff, in answer

to a carefully prepared question addressed to him upon his cross-examination, assents to a statement of a custom in regard to which he has testified on his direct examination, which gives it a different significance less favorable for him than his own previous statement of it, and his attention is not specifically drawn to the possibly vital difference between the custom thus phrased and the statement of it given in his direct examination, it is proper for the presiding judge to refuse to give an instruction based on the assumption that the plaintiff's latest statement of the custom is the correct one, and it is the province of the jury to weigh these apparent inconsistencies in the plaintiff's testimony and determine what the custom was.

At the trial of an action of tort for personal injuries, where the case is tried and submitted to the jury upon several counts, alleging different grounds for the defendant's liability, it is proper for the presiding judge to refuse a request of the defendant for an instruction which is applicable to only one of the alleged grounds of liability but is not restricted by its terms to that issue.

In an action against a railroad corporation for personal injuries sustained while in the employ of the defendant as a night conductor in one of the defendant's freight yards, alleged to have been caused by the negligence of a day conductor of the defendant employed in the same yard when in charge of a train of the defendant, the plaintiff may be asked by his own counsel the question, "Did you have when you were going up there that night on that train any knowledge or appreciation that there was any danger in so doing?" to which he answers "No, sir"; because whether the plaintiff knew or as a prudent person ought to have known of the risk he incurred is material upon the question of his due care.

On the redirect examination of the plaintiff in an action of tort, against a railroad corporation under the employers' liability act, in regard to the duties which he was required to perform in the service of the defendant, if the witness is asked, "What he was supposed to do," the use of this loose or objectionable phrase will not sustain an exception to the admission of the question against a general objection of the defendant, in the absence of any objection to the form of the question at the time it was asked.

TORT for personal injuries sustained on April 18, 1907, while in the employ of the defendant as a night conductor in the defendant's freight yard at South Framingham. Writ dated June 18, 1907.

In the Superior Court the case was tried before *Bell, J.* The declaration after amendment contained seven counts, but the case was submitted to the jury only on the fourth, sixth and seventh counts. The fourth count alleged that the plaintiff's injuries were caused by the negligence of the engineer of a locomotive engine of the defendant which was propelling a train of cars upon one of which was the plaintiff, the seventh count alleged that the plaintiff's injuries were caused by the negligence of some person or persons who was or were in charge of or who had control of a railroad train upon which was the plaintiff, and the sixth count alleged that the plaintiff's injuries were

caused by the negligence of a person in charge and control of a train of cars, which came in collision with the train of cars in which was the plaintiff, referring to the alleged negligence of one Willis, a day conductor of the defendant in the same yard.

The facts which appeared in evidence are stated in the opinion. At the close of the evidence the defendant asked the judge to make the following rulings:

"1. Upon all the evidence the plaintiff is not entitled to recover.

"2. There is not sufficient evidence of the plaintiff's due care.

"3. There is no evidence of the defendant's negligence.

"4. There is no evidence of negligence on the part of the conductor Willis."

"6. There is no evidence of negligence on the part of the engineer in charge of the engine which was moving the cars upon which Lury was riding.

"7. If the jury find that Mr. Willis placed no more cars upon track 4 after the alleged conversation with Mr. Lury, then there is no evidence of Willis's negligence.

"8. If the jury find that no cars were placed on track 4 after the conversation between the plaintiff and Willis, then the plaintiff was not in the exercise of due care."

The judge refused to make any of these rulings, and submitted the case to the jury on the three counts named above with instructions, which contained among other things the following:

"I understand that the inquiry is for most purposes confined to what happened between half past seven and quarter past eight, — a space of three quarters of an hour. Before half past seven, it is immaterial so far as the liability is concerned, because it is the testimony of Lury himself, which was uncontradicted, that it was his duty to inspect the yard and see if there were any cars which were in a dangerous position there; and he says he did inspect the yard. And so we seem to be led to either one of two conclusions with regard to any period before half past seven; either that there was no car there then, no danger there then, which concerns us, or else that Lury's inspection was careless. Either conclusion seems to follow, and if Lury was careless in his inspection then of course he cannot recover, as I shall state to you farther on. So, beginning with the car, the first question

was, was it there in a cornering position at half past seven? It was there at quarter past eight. It would follow, of course, if it was not there at half past seven, somebody put it there between half past seven and quarter past eight, because we know it was there at quarter past eight. . . . So determine what Willis did, by himself or his subordinates — because what his men did, he did; he was responsible for what they did, and whatever his men did, it was his duty to look out for and see that it was done right, and therefore whatever his men did, you may attribute it to him if he was negligent — did Willis, either during the time when the plaintiff after his inspection, if he made one, was going up and back, or after he left Lury at the north end of the yard and backed down toward the south end, push any car upon this track 4 in the position in which it was afterwards found, or was that car there before half past seven or 7.45, when Lury and Bennett say they looked there and did not see it?

“If he [the plaintiff] had been the only person switching cars in that yard that night, it would have been one situation, because he might have felt that when he had once made himself familiar with all that took place in that yard he would know all the changes thereafter made, and unless his memory slipped him, he would know what the changes were. But when you introduce into the yard another freight gang over which he has no control and of whose movements he may know much or may know little, there is a new element to be taken into account and which he must take into account on the question of care, and he says that he did take it into account in two ways: in the first place, he says there was a custom that the other men, the other gang, should notify him if there was anything which that gang did which would be dangerous to him. Was there such a custom or was there not? If there was such a custom, it depends on the question of what he ought to do. Did he have the full talk with Willis which he says he did and Willis’s assurance that nothing should be done to injure him without his giving notice of it? If Willis gave that assurance, it would bear upon the question of his due care and of how much care he must take; and if it was Willis’s act after that, which caused the accident, then it would bear directly upon his care in this case.”

The jury returned a verdict for the defendant on the fourth

and the seventh counts, and returned a verdict for the plaintiff on the sixth count in the sum of \$4,000. The defendant alleged exceptions to the refusal of the rulings requested by it and to the following instruction included in the portion of the judge's charge which is quoted above: "So determine what Willis did by himself or his subordinates, because what his men did, he did; he was responsible for what they did, and whatever his men did it was his duty to look out for and see that it was done right, and therefore, whatever his men did, you may attribute it to him if he was negligent."

The defendant also alleged certain exceptions relating to evidence. One of these was to the admission of the following question asked the plaintiff by his own counsel: "Did you have when you were going up there that night on that train any knowledge or appreciation that there was any danger in so doing?" The plaintiff answered, "No, sir." The other exceptions relating to evidence are described sufficiently in the opinion.

J. L. Hall, for the defendant.

J. H. Vahey, (*F. H. Hilton* with him,) for the plaintiff.

RUGG, J. The plaintiff was an experienced freight conductor working at night for the defendant in its South Framingham yard. He recovered upon a count alleging that he sustained injuries through the negligence of one Willis, a freight conductor of the defendant, working during the day in the same yard. There was evidence from which it might have been found that soon after 7.35 o'clock of a dark April night the plaintiff, in accordance with his duty and custom, made an inspection of the cars standing upon the several tracks at the southerly end of the yard, and ascertained that no cars "cornered," that is, were so near the junction with an adjoining track as to be struck by cars in motion upon it, and that on track number 4 there was room for three or four cars. A few minutes later he boarded the locomotive, of which he had charge, and went to the north end of the yard, where Willis was at work with a switching engine and crew. Willis said that he had only two or three more switches to make, after which he was going to the roundhouse, at the south end of the yard, and stop work for the day. Thereupon the plaintiff told him "We was making up a train . . . on No. 6,

in the south end of the yard, and to look out for us if he was to use any of those tracks that would come out into 4 lead," that is, the track from which were switches to reach tracks numbers 4, 6 and others. To this Willis replied that he would. It was Willis's duty to see that no cars moved by his orders were left where they would not clear cars moving on adjoining tracks. There was a custom in the yard respecting a warning by one of a train crew, which placed a car so that it cornered on another track, "of sending a man from one end of the iron to the other to see that these cars wasn't cornered or shoved out, and to notify anybody that would be liable to use that end of the yard." The locomotives in charge of the plaintiff and of Willis respectively were the only ones in use in the yard that night. By eight o'clock the latter had stopped work, and his locomotive was put up for the night. The plaintiff with his crew did not go upon track number 4, but at 8.15 P. M., going from the southern end of the yard to track number 6, by reason of cars cornering from track number 4, he was injured.

1. There was testimony strongly tending to weaken the force of much of this, especially to the point that the custom governed only after notice had been given that another crew was to work in that part of the yard. But we cannot say that taken together it is not susceptible of the construction that the custom was general, prevailing even when there was no such notice. If this was found to be so, then, although it was the plaintiff's duty "to know that the cars cleared before" he "made a single switching movement" on the track in question,* it cannot be ruled as matter of law that he was wanting in ordinary prudence to rely on his inspection made barely half an hour before, when he testified that the condition was safe. The question of the due care of the plaintiff was for the jury on the whole evidence.

2. There was also some evidence from which negligence of Willis might be inferred. The conclusion cannot be pronounced unreasonable that either in the time between the inspection by the plaintiff and his conversation with Willis or after the latter left the north end of the yard, he caused cars upon track num-

* On the plaintiff's cross-examination he was asked the question, "It was your business to know that the cars cleared before you made a single switching movement on to that lead?" He answered, "Yes."

ber 4 to be so placed that they would not clear the adjoining tracks. If this was found, then he might have been pronounced negligent, especially if the general custom referred to existed and no notification was given. *Dacey v. Old Colony Railroad*, 158 Mass. 112.

3. It is earnestly argued that the request to the effect that "If the jury find that Mr. Willis placed no more cars upon track 4 after the alleged conversation with Mr. Lury, then there is no evidence of Willis's negligence" should have been given. This contention is predicated chiefly upon the assent of the plaintiff to the carefully prepared question put to him on cross-examination, whether the custom was not for the warning to be given after a notification of intention to work in that part of the yard if cars were pushed down so they would corner. The witness's attention was not specifically drawn to the possibly vital difference between the custom thus phrased and the statement given by him on direct examination, which he did not otherwise modify or withdraw. It is an instance of conflicting sentences of testimony, where an instruction is sought on the assumption that one is the whole truth. In such case it is the province of the jury to weigh apparent inconsistencies, and ascertain how far there is real conflict upon all the evidence and not upon any selected portion. *Donovan v. Chase-Shawmut Co.*, ante, 248, and cases cited.

The eighth request for an instruction to the effect that the plaintiff was not in the exercise of due care if no cars were placed upon track number 4 after his conversation with Willis was properly refused for the reason, in addition to those heretofore stated, that the case was submitted to the jury upon several counts as to which the request was not applicable, and it was not restricted in its scope to the form of action now under discussion.

There is no ground for the contention that the jury were misled by the portion of the charge in substance that Willis was responsible for what his subordinates did in the management of the car. The context shows that this related to his duties of supervision as one having charge or control of a train, and in view of the evidence cannot be presumed to have been misunderstood or misapplied.

4. The testimony as to the custom was plainly competent as bearing upon the due care of the plaintiff and perhaps for other purposes. *Meadowcroft v. New York, New Haven, & Hartford Railroad*, 193 Mass. 249. If the defendant desired to have its effect limited or regarded the answer as irresponsible or unintelligible, appropriate action should have been taken at the time directed to such particulars. The inquiry to the plaintiff as to his appreciation of danger was competent. Whether he knew or as a prudent person ought to have known of the risk incurred bore upon his due care. The questions in redirect examination of the plaintiff as to his duties respecting examination of switches and tracks, to which objection was made, was upon a subject as to which he had been cross-examined fully, and may have related to the witness's familiarity either with unwritten customs prevailing in the yard or with written rules. In either event it was competent. The employment of loose and perhaps objectionable phraseology as to what he "was supposed to do" in a collateral clause of the question, in the absence of specific objection at the time, cannot avail now for setting aside a verdict.

Exceptions overruled.

RACHEL G. TOURTILLOTTE & others vs. FRED E. TOURTILLOTTE & another.

Essex. November 4, 1909. — May 18, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Trust, Constructive. Frauds, Statute of. Burial Lot. Equity Pleading and Practice, Answer.

In a suit in equity against one brother in a family by all of his nine brothers and sisters, in which the plaintiffs sought to have the defendant declared trustee for himself and them of a burial lot, which he had purchased and the title to which he had taken in his own name, the following facts appeared: In 1891 the plaintiffs and the defendant and their father were living together and jointly contributing to the family support. In that year a sister died, and, the family then being without a burial lot and the defendant not at that time having contributed his full share to the family expenses, it was agreed among them that the defend-

ant should pay for a lot which they all selected and that the deed should be made to the father. The defendant paid for the lot, but the deed conveyed the lot to him individually. The making of the deed to the defendant was accidental, and the defendant acted in good faith in the matter. The deed was kept unconcealed in a desk used by and equally accessible to all members of the family. The father never learned of the state of the title, and died in 1895. The plaintiffs learned of it in 1896 or 1897 and then questioned the defendant, who told them that it was all right, that it did not matter, and used other similar expressions which they regarded as amounting to an oral promise to hold the lot for their benefit as well as for his own. In the meantime the body of the mother had been moved from a former home of the family and interred in the lot and another sister had died and had been buried there, as well as the father; and from an annuity provided by insurance of the sister a family monument had been erected upon the lot. In 1906, dissensions having arisen between the defendant and the plaintiffs, he asserted an absolute right in the lot, and the plaintiffs at once brought this suit. *Held*, that, there being an entire absence of a written memorandum of a trust, such as is required by R. L. c. 74, § 1, cl. 4, and by R. L. c. 147, § 1, the suit could not be maintained.

Where a bill in equity, in which the plaintiffs seek to have the defendant, their brother, declared trustee for himself and them of a burial lot, which was purchased by the defendant and the title to which he took in his own name, avers merely that before the purchase the plaintiffs and the defendant orally agreed that the title should be taken in the name of their father, who had died after the conveyance to the defendant, and does not aver any other promise or contract of the defendant with regard to the matter, and relies only upon oral declarations with regard thereto made by the defendant after the purchase, it is not necessary for the defendant, in order to rely on the provisions of R. L. c. 74, § 1, cl. 4, and of R. L. c. 147, § 1, requiring a memorandum in writing to make such a promise or declaration enforceable, to allege such defense in his answer.

BILL IN EQUITY, filed in the Superior Court on February 14, 1908, and afterwards amended, against Fred E. Tourtillotte and the Hildale Cemetery Association, a corporation, by all of the brothers and sisters of the defendant Tourtillotte, nine in number, seeking to have the defendant Tourtillotte declared to be trustee for himself and the plaintiffs of a burial lot which he had purchased from the defendant corporation and the title to which he had received in his own name.

The case was heard by *Pierce*, J. He filed the following memorandum:

"I find that the Tourtillotte family, consisting of father, ten daughters and two sons, of whom the plaintiffs and the defendant formed a part, came to Haverhill from Woodstock, New Hampshire, in or about 1885; that previous to that date the mother had died and had been buried in her family burial lot in the cemetery in said Woodstock; that at some time previous to May

30, 1891, one of the daughters, Gladys, sickened, and on that day died; that at the time of her death the family had no burial lot other than that in said Woodstock; that while said Gladys was sick there were frequent talks in the family circle about the procurement of such a lot; that at that time all the family were living together, and were each contributing to the family needs from their respective earnings such proportionate sums as they were able; that two of the daughters, Effie L. and Helen A., and the defendant visited one or more cemeteries and finally selected the lot concerning which this suit is brought, which lot was sufficient in size to permit of the burial therein of every then member of the family; that it was then orally agreed that the title to the lot should be taken in the name of the father; that the defendant then stated that, inasmuch as he had not paid his full share of the family expense, he would pay for the lot; and, following said selection, the defendant bargained for the lot and finally paid of his own individual money the sum of \$60 therefor, though he did not secure a deed until the September following; that in making such payment he did not loan, or offer to loan, the money so paid out by him to his sisters or to his father; that the deed as finally delivered to him ran to him in his own right and in no way, directly or indirectly, made any reference to the family or any family interests; that in so taking the deed and title he acted in good faith and was free from any purpose to cheat or defraud any one or all the members of his family; that the making of the deed in his name by the grantor was probably accidental, and I so find, and when the error was discovered by the defendant was thought by him to answer the purpose had in view, namely, the purchase of a family lot, as well as if the title had in fact run to the father — and I also find that the family at that time would have been equally satisfied; that the deed was placed in a desk used by and equally accessible to all members of the family, though there was no satisfactory evidence that any member of the family other than the defendant ever saw or read the deed or knew how the title ran until after the death of the father in 1895; that the son lived with and in harmony with all the members of the family until his marriage in 1897; that of the sisters Effie L. died January 21, 1892, and was buried in the lot; that the father, Josiah, died March 3,

1895, and was buried in this lot, and that the mother's body was removed from Woodstock cemetery and buried in the lot; that the said Effie L. left a life insurance annuity of \$2,000, which was payable to one of the daughters, Rachel; that previous to her death she had requested that from said insurance money Rachel should cause a family monument to be set up upon said lot; that after her death and the receipt of the insurance money, from such money Rachel caused a monument to be set up at an expense of \$675; and also then, and at other times, expended several small sums of money in grading and care of the lot; that the family as a family from time to time expended small sums of money upon the lot, for flowers, etc.; that such sums and such care would have been expended and given, if permitted, irrespective of any question of supposed title or ownership, because of family affection and filial and sisterly duty; that within a year or two following the death of the father in 1895, every one of the family had actual knowledge, arising from an inspection and from an actual possession of the deed, that the title to the lot was in the defendant; that they questioned him concerning it, and that he then said that it was all right as it was, that it did not matter, and other equivalent expressions; that, other than as may be inferred from such kind of talk, no representation and absolutely no misrepresentations were made by the defendant to his sisters, which could or did lull them into a sense of security or lead them to rest inactive; and that matters remained *in statu quo* until 1906, when the defendant, dissension having sprung up in the family concerning other matters, in terms notified the sisters that he claimed an absolute and unconditional right in the lot and denied their right. This suit followed.

"Upon the foregoing facts I find that neither a resulting nor constructive trust was established, and the order is that the bill be dismissed without costs."

A decree accordingly was entered dismissing the bill without costs; and the plaintiffs appealed.

The case was argued at the bar in November, 1909, before Knowlton, C. J., Morton, Loring, Braley, & Sheldon, JJ., and afterwards was submitted on briefs to all the justices.

E. S. Abbott, for the plaintiffs.

E. E. Crawshaw, for the defendant Fred E. Tourtillotte.

SHELDON, J. All the members of the Tourtillotte family, including both the plaintiffs and the defendant, intended that the title to this burial lot should be taken in the name of the father, the children no doubt expecting to inherit it as heirs at law, in which case they would have held it under the provisions of R. L. c. 78, § 26. By a mistake, the particulars of which do not appear, the deed was taken in the name of the defendant. This was in July, 1891. The father died in March, 1895. The deed had been kept unconcealed in a desk used by and equally accessible to all the members of the family; but it did not appear that the father ever learned the real state of the title, or that the plaintiffs knew what it was until a year or two after their father's death, that is, in 1896 or 1897. They then questioned the defendant and he told them that it was all right, that it did not matter, with other similar expressions, which they undoubtedly regarded as amounting to an oral promise to hold the lot for their benefit as well as his own. But in 1906 he notified the plaintiffs that he claimed an absolute and unconditional title in the lot. Thereupon they brought this suit.

Upon these facts, it seems to the majority of the court to be clear under our decisions that the bill cannot be maintained. The plaintiffs relied upon mere oral declarations of the defendant. R. L. c. 147, § 1. Much as it is to be regretted that he now chooses to make his word of no value, equity cannot enforce it against him. *Parsons v. Phelan*, 134 Mass. 109. *Collins v. Sullivan*, 135 Mass. 461. *Emerson v. Galloupe*, 158 Mass. 146. *Bourke v. Callanan*, 160 Mass. 195. *Rose v. Fall River Five Cents Savings Bank*, 165 Mass. 273. The argument that the enforcement of this general rule works a hardship and enables the defendant to do an injustice to the plaintiffs in this case was stated and answered by Holmes, J., in *Bourke v. Callanan*, *ubi supra*.

It does not matter that the provisions of R. L. c. 74, § 1, cl. 4, or c. 147, § 1, were not set up in the answer. The bill did not aver any contract or promise by the defendant, except one which was alleged to have been made before the purchase of the lot, and this was not proved. Apart from this, the bill relies only upon oral declarations of the defendant. The plaintiffs do not ask for a conveyance. There was no occasion to plead the

statute of frauds. It was not pleaded in *Collins v. Sullivan*, *ubi supra*.

We are aware that our decisions above cited have been criticised, and that there are cases in other jurisdictions which tend to sustain the claim of the plaintiffs. And it is true that equity will often raise a constructive trust to defeat a fraud. *Moore v. Crawford*, 130 U. S. 122, 128. *Stark v. Starrs*, 6 Wall. 402, 409. *Meader v. Norton*, 11 Wall. 442, 458. *Sanford v. Sanford*, 139 U. S. 642, 646. *Ryan v. Dox*, 34 N. Y. 307. *Reitz v. Reitz*, 80 N. Y. 538, 540. *Matthews v. Light*, 32 Maine, 305. *Church v. Sterling*, 16 Conn. 388. *Dodd v. Wakeman*, 11 C. E. Green, 484. *Laing v. McKee*, 13 Mich. 124. *Rollins v. Mitchell*, 52 Minn. 41. *Martin v. Martin*, 16 B. Mon. 8. *Cannon v. Gilmer*, 135 Ala. 302. *Alaniz v. Casenave*, 91 Cal. 41. *Lees v. Nuttall*, 1 Russ. & M. 53, and on appeal, 2 Myl. & K. 819. *Taylor v. Salmon*, 4 Myl. & Cr. 134. *Rolfe v. Gregory*, 4 DeG., J. & S. 576, 579. But most of these cases come under the rule of *Tate v. Williamson*, L. R. 2 Ch. 55, 61, (see *Hill v. Hall*, 191 Mass. 253, 263,) or under that stated by Brayton, C. J., in *Jenckes v. Cook*, 9 R. I. 520, 525. So far as any of them go beyond the rules laid down in our own decisions already referred to, we must abide by the latter.

In the case at bar, the deed by a mistake was made to run to the defendant instead of his father. If we assume (what has not been found) that this was a mutual mistake of the parties to the deed of such a character and so clearly proved that it might have been corrected in equity at the suit of the father (*Page v. Higgins*, 150 Mass. 27; *Stockbridge Iron Co. v. Hudson Iron Co.* 107 Mass. 290), and that it was not acquiesced in by the father in his lifetime, it yet remains true that the plaintiffs, when in 1896 or 1897 they discovered the mistake, were content to leave it uncorrected, and to rely wholly on the oral representations of their brother. The case does not come within the rules of *Goode v. Riley*, 153 Mass. 585; *Canedy v. Marcy*, 13 Gray, 373; *Mattingly v. Speak*, 4 Bush, 316, or *Bohanan v. Bohanan*, 3 Ill. App. 502. And see *Dougan v. Bemis*, 95 Minn. 220, and the note to that case in 5 Am. & Eng. Ann. Cas. 255.

The defendant's counsel at the argument in this court con-

sented that the plaintiffs might remove from the lot the family monument placed upon it by one of them. The decree appealed from will be modified so as to allow them to do this, and so modified will be

Affirmed.

ALBERT H. MEADS & another vs. EUGENIA M. EARLE.

Norfolk. January 20, 1910. — May 18, 1910.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Will, Execution.

Upon the issue of the execution of a will, it appeared that the alleged testatrix was a woman of superior education, intelligent and self-reliant, and that she was stopping temporarily at a hotel in the city of New York for the purpose of starting in a day or two on a voyage to Europe, that she had procured a blank form for making a will, which had a printed exordium, leaving blank spaces for the name and residence of the person making the will, and, after an extensive blank space for the body of the will, had a printed *in testimonium* clause and below it a printed clause of attestation to be signed by witnesses, that there were three dotted lines indicating where the subscribing witnesses were to sign, but that there was no line dotted or otherwise between the *in testimonium* clause and the attestation clause indicating where the testator was to sign, that the alleged testatrix filled in the blank spaces in the exordium by writing in her name and residence, crossing out inapplicable printed words, and wrote in the blank space provided for the body of the will about twenty bequests, dealing with her estate with great detail in clear and intelligent language, that, after the attestation clause and below the three dotted lines indicating the places for the signatures of the witnesses, she wrote a clause nominating executors and requesting that they should be required to give no bonds, that, before the witnesses signed, every written word of the instrument was in the handwriting of the alleged testatrix, that she then took the instrument to another woman stopping at the same hotel and asked her to sign it as a witness to her will, saying that it required three witnesses, that the alleged testatrix sat down and wrote something on the paper which the witness did not read and then handed it to the witness who signed her name where the alleged testatrix told her to, that the alleged testatrix was by the side of the witness when she signed, that later on the same day two other witnesses also signed the attestation clause in the presence of the alleged testatrix after she had told them that the instrument was her last will and had asked them to sign as witnesses but had not otherwise mentioned her signature nor called it to their attention, that shortly afterwards the alleged testatrix caused this instrument to be deposited in her safe deposit vault box, where it remained until her death. *Held*, that this evidence warranted a finding that when the alleged testatrix wrote her name in the exordium of the instrument she intended it to be the signing of her will, and that this intent continued when all of the witnesses signed, and that therefore the will was properly signed and the signature properly attested in accordance with the requirements of R. L. c. 185, § 1.

HAMMOND, J. This was an appeal from a decree of the Probate Court disallowing an instrument as the last will of Sarah J. Armstrong. The case was heard by a single justice of this court* upon an inspection of the will, the agreed facts and the depositions of the three subscribing witnesses. The appellee requested the judge to rule as matter of law that the instrument was not signed by the testatrix and attested and subscribed in her presence by three competent witnesses in accordance with the requirements of R. L. c. 135, § 1. The justice declined so to rule and found as facts "that so far as the will is in manuscript, the handwriting including her name or signature is that of Sarah J. Armstrong; that although she did not sign at the end of the instrument, yet when she wrote her name at the beginning of the will, it was with the intention that this act was a signing of the will; that independently of the attestation clause, she by words and conduct acknowledged and declared the will before the subscribing witnesses and that the subscribing witnesses signed the attestation clause in her presence at her request and upon her acknowledgment and declaration that it was her will, although neither of them saw her signature."

Having so found he ruled that the document was signed, attested and subscribed "within the meaning of the statute," and that it was a valid will. The case is before us upon his report. If the ruling requested by the appellee should have been given, a decree is to be entered affirming the decree of the Probate Court; otherwise a decree is to be entered reversing that decree, admitting the will to probate and remanding the case to that court for further proceedings.

The findings of the single justice are to stand unless plainly wrong. At the time of the execution of the will Miss Armstrong was temporarily stopping at the Manhattan Hotel in New York city, on the eve of a voyage to Italy. It is a reasonable inference from the testimony that the will was drafted just before its execution. She had procured a blank form containing at the beginning the following printed words, to wit: "Be it remembered that I, . . . of . . . in the Commonwealth of Massachusetts, being of sound mind and memory, but knowing

* *Braley, J.*

the uncertainty of this life, do make this my last will and testament. After the payment of my just debts and funeral charges, I bequeath and devise as follows:” At the end of the blank was printed the *in testimonium* clause, blanks being left for the date, and following that clause was the printed attestation clause as follows: “On this . . . day of . . . A.D. 19 , . . . of Massachusetts, signed the foregoing instrument in our presence, declaring it to be . . . last will; and as witnesses thereof we three do now at . . . request, in . . . presence, and in the presence of each other, hereto subscribe our names.” Between the printed words at the beginning of the will and the printed *in testimonium* words at the end, there was an extended blank space for the body of the will, but the space between the latter clause and the attestation clause was small and there was no line, dotted or otherwise, indicating the place for a signature, while following the attestation clause there were three dotted lines indicating where the subscribing witnesses were to sign.

With this blank before her she begins, apparently unaided, to write her will. She first makes the proper changes in the *exordium*. She fills the blank space after the word “I” with her name. She writes in the next blank space, “Cincinnati, Ohio,” and crosses out the words “in the Commonwealth of Massachusetts.” As thus changed the *exordium* reads: “Be it remembered that I, Sarah J. Armstrong, of Cincinnati, Ohio, being of sound mind,” etc. She proceeds to write in the blank space provided for the body of the will. The will deals with her estate in great detail, containing nearly twenty different bequests. She then fills the proper spaces in the *in testimonium* and attestation clauses, putting her name and residence and the pronouns in the proper places in the latter clause. After the attestation clause and below the dotted lines indicating the places for the signatures of the three witnesses, she writes the clause nominating the executors and requesting that they be required to give no bonds. Every written word is in her handwriting. The will is clearly and intelligently drawn. The evidence of the subscribing witnesses shows that she was a woman of refinement and superior mental endowment. She had been for several years in charge of a young ladies’ school; and from the glimpses we get of her it is not difficult to detect her resolute and self-reliant nature. There

is no indication that she was not in good health. In a day or two she was to take the steamer for Italy.

With this document this intelligent, self-reliant woman came to Miss Hall, the first witness, who describes the interview thus: "I was at the Manhattan Hotel writing home when Miss Armstrong came up to me and asked me if I would sign her will as a witness. She said: 'I would not ask this of you, but Miss Hunter and the Clays cannot because they are mentioned in the will, and it requires three witnesses; the Misses Jaudon have said they would.' She then sat down and wrote something on the paper which I did not read, then handed it to me and I signed my name where she told me to; she was by my side when I signed it."

Subsequently, and apparently upon the same day, the other two witnesses signed. Each of the three witnesses testified in substance that Miss Armstrong stated that the document was her last will and asked her to sign as a witness. In no other way did Miss Armstrong mention her signature or call it to the attention of the witnesses. Shortly afterwards the instrument, thus written and thus attested, was deposited at the request of Miss Armstrong in her safe deposit vault, and there remained until her death.

There can be no doubt that she intended to make, and supposed she had made a valid will. The care she took in writing the paper, in seeing to its attestation, and in putting and keeping it in a safe place shows that. She does not appear to have been advised or assisted by any one. She personally superintended the whole work. There was however no signature at the end; and it is contended by the contestants that the single justice was not warranted in finding that she wrote her name at the beginning *animo signandi*.

The finding must be interpreted to mean not simply that after writing her whole will she adopted as her signature her name as written previously in the *exordium*, but that at the time she wrote her name there she intended that it should stand as her signature to the will when completed, and that this intent continued to the end. Such a finding is perfectly consistent with what she did, and is not inconsistent with any act of hers. It explains any apparent incongruity in the evidence. It welds all

the circumstances into one harmonious whole and is supported by the evidence.

The will was therefore properly signed. *Lemayne v. Stanley*, 8 Lev. 1. And the signature was properly attested. *Dewey v. Dewey*, 1 Met. 349, and cases cited. *Adams v. Field*, 21 Vt. 256. The ruling requested by the appellee was properly refused.

In view of this finding as to Miss Armstrong's intent at the time she wrote her name in the *exordium*, it becomes unnecessary to consider the question whether there is evidence of a subsequent adoption of the name as her signature, even if originally written with no intent to have it finally stand as such.

Upon the question as to the kind of evidence required to prove such adoption, the cases are not in complete harmony. Among the authorities bearing upon this, as well as the general question involved in the case, see in addition to the authorities hereinbefore cited the following: *Hall v. Hall*, 17 Pick. 373; *Hogan v. Grosvenor*, 10 Met. 54; *Ela v. Edwards*, 16 Gray, 91; *Penniman v. Hartshorn*, 13 Mass. 87; *Nickerson v. Buck*, 12 Cush. 332; *Right v. Price*, 1 Dougl. 241; *Grayson v. Atkinson*, 2 Ves. Sr. 454; *Griffin v. Griffin*, 4 Ves. 197, note; *Morison v. Turnour*, 18 Ves. 175, 183; *Ellis v. Smith*, 1 Ves. Jr. 11; *Armstrong v. Armstrong*, 29 Ala. 538; *Merritt v. Clason*, 12 Johns. 102; *Clason v. Bailey*, 14 Johns. 484; *In re will of Booth*, 127 N. Y. 109; *Catlett v. Catlett*, 55 Mo. 330; *Warwick v. Warwick*, 86 Va. 596; *Waller v. Waller*, 1 Gratt. 454; 1 Jarm. Wills, (5th Am. ed.) 79, 80; 1 Redf. Wills, (4th ed.) 210 *et seq.*

In accordance with the terms of the report a decree is to be entered reversing the decree of the Probate Court, admitting the will to probate and remanding the case to that court for further proceedings.

So ordered.

J. S. Patton, (*F. J. Ranlett* with him,) for the appellee.

J. G. Palfrey, (*H. Twombly* with him,) for the appellants.

FREDERICK R. SEARS & others, executors, vs. ASSESSORS OF
THE TOWN OF NAHANT.

Essex. March 1, 2, 1910. — May 18, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Tax, Abatement. Superior Court.

History of legislation as to the requirement that a taxpayer shall furnish to the assessors a list of his taxable property before the day specified in the notice from the assessors, as a condition precedent to a complaint appealing from a refusal of the assessors to abate a tax on such property, recounted by HAMMOND, J.

Remark of METCALF, J., in *Winnisimmet Co. v. Assessors of Chelsea*, 6 Cush. 477, 481, that "by the provincial statutes . . . a party, aggrieved at the sum apportioned on him by assessors, and being refused an abatement by them, might appeal to the sessions for an abatement, in all cases, as a matter of right," declared to be erroneous so far at least as respects the law after 1735. Per HAMMOND, J.

Under R. L. c. 12, §§ 77, 78, on an appeal from the refusal of the assessors of a town or city to abate a tax, the Superior Court has no power to abate the tax where the required list of taxable property was not brought in within the time specified in the notice given by the assessors, unless the assessors have found or the Superior Court finds that there was good cause for the delay.

PETITION, filed in the Superior Court on March 1, 1909, under R. L. c. 12, § 78, appealing from the refusal of the assessors of the town of Nahant to abate a tax assessed to the petitioners as the executors of the will of Frederick R. Sears.

In the Superior Court the case was heard by Crosby, J., without a jury. Frederick R. Sears died on June 27, 1907. His will was allowed on July 22, 1907. The executors thereunder were the petitioners, the four sons of the testator, Frederick R. Sears, Richard D. Sears, Philip S. Sears and Herbert M. Sears. On December 31, 1908, the petitioners filed a petition to the assessors of the town of Nahant, requesting an abatement of taxes assessed on May 1, 1908, amounting to \$1,116.50, and also an abatement of taxes amounting to \$44,000. On January 13, 1909, the assessors gave a hearing to the petitioners upon their petition, and on January 26, 1909, refused to abate the tax of \$44,000, (as well as the tax for \$1,116.50,) and notified the petitioners of their decision by a letter.

On March 1, 1909, the petitioners paid under protest in writing to the collector of the town of Nahant the tax so assessed for \$44,000 with interest on that amount in addition, amounting

to \$1,320. The assessors of the town of Nahant before making the assessments for 1908 gave the notice required by the statutes to the inhabitants and other persons liable to pay taxes therein, to bring in true lists of their personal estates before June 1, 1908. Excepting a certain sworn statement and notice dated December 31, 1908, the form of which is not now material, the petitioners did not file with the assessors any list of personal property for the year 1908, or give them notice of the distribution of the estate of Frederick R. Sears. The petitioners did not file any lists of their taxable property for the year 1908 either in Nahant or elsewhere, either as executors, trustees or in their individual capacities, except the instrument filed with the assessors of Nahant on December 31, 1908.

The judge found that the petitioners had not shown a reasonable excuse for their delay in not filing a list of personal property within the time specified in the notice given by the assessors for the bringing in of lists, and that there was no good cause for their delay in not doing so. He further found that although the assessors on October 15, 1908, sent to Herbert M. Sears a letter and on October 24, 1908, sent to Philip S. Sears a letter, requesting them to make a sworn return of personal property belonging to the estate of Frederick R. Sears, and although these letters were received, no reply was made to either of them, and no information was furnished by the petitioners to the assessors concerning the estate except that contained in the affidavit dated and delivered to the chairman of the board of assessors on December 31, 1908, contemporaneously with the petition for an abatement of taxes, which already has been referred to. The assessors acted in good faith, and made the assessment on their best information and belief.

The judge found that the assessors never had waived their right to have the petitioners furnish them with a list of personal estate in accordance with law, and never accepted the affidavit dated December 31, 1908, as a legal and sufficient list of the personal estate. He found further, upon all the evidence in the case, that the petitioners undertook to distribute the personal estate left by Frederick R. Sears before May 1, 1908, for the purpose of avoiding the payment of a tax thereon for the year 1908, and did actually distribute all of the personal estate before

May 1, 1908, except the one hundred shares of stock of the North American Insurance Company and forty \$1,000 five per cent bonds of the Chicago Junction Railway and Union Stockyards Company. As to this stock and these bonds, the judge found and ruled that they had not been legally distributed before May 1, 1908, but that on that date the legal title to the stock and bonds remained in the petitioners.

The judge refused to make certain rulings requested by the petitioners, and made the following decision :

"While the petitioners pray for an abatement of the tax assessed to estate of Frederick R. Sears in July, 1908, on a valuation of \$101,500 and amounting to \$1,116.50, I do not understand that the petitioners claim they are entitled to an abatement of this tax, as it was not assessed to the executors; it was therefore an illegal assessment, and the only remedy which the petitioners have, if any, to recover it back, is by an action of contract, and I so rule.

"I find that the petitioners are not entitled to an abatement of any portion of the tax of \$44,000 levied upon the executors, and that the petition should be dismissed, and judgment rendered for the town of Nahant for its costs, to be taxed as in an action at law, and I report the case upon the facts found for the determination of the Supreme Judicial Court."

In accordance with this decision the judge reported the case for determination by this court. If upon any view of the law, arising upon the facts found, the petitioners were entitled to an abatement, judgment was to be entered for the petitioners in such sum as law and justice might require, or the cause might be remanded to the Superior Court to determine the amount of abatement to which the petitioners were entitled, with such costs, if any, in either event, as they might be entitled to. Otherwise judgment was to be entered upon the finding in favor of the respondent, with such costs and expenses as it might be entitled to, to be taxed by the Superior Court.

H. E. Bolles, (*W. C. Rice* with him,) for the petitioners.

S. H. Hudson & *P. Nichols*, for the respondents.

HAMMOND, J. This petition for the abatement of a tax upon personal property is filed under R. L. c. 12, § 78. Section 77 of the same chapter, after providing that a person aggrieved by the

refusal of the assessors to abate a tax may appeal therefrom by filing a complaint with the county commissioners, or any board exercising the power of such commissioners for the county in which the property is situated, and that if on a hearing the board finds that the property has been overrated it shall make a reasonable abatement and an order as to costs, further proceeds as follows: "If the list required to be brought in to the assessors was not brought in within the time specified in the notice required by section forty-one, the tax shall not be abated unless the appellate board finds that there was good cause for the delay or unless the assessors have so found as provided in section seventy-four. No costs shall be allowed to a complainant who has failed to file a list as required by law." Section 78 gives to the taxpayer a right to appeal to the Superior Court upon the same conditions.

The list referred to is the list of his estate not exempt from taxation which, in response to a notice of the assessors, every taxpayer is required to hand in to the assessors. No list of any kind was handed in as required by the assessors until long after the time specified in the notice. It is not contended by the petitioners that the assessors found that there was either a reasonable excuse or good cause for the delay; and the appellate court has expressly found that "the petitioners have not shown a reasonable excuse for their delay in not filing a list of personal property within the time specified in the notice given by the assessors for the bringing in of lists, and that there was no good cause for their delay in not doing so." One of the grounds of the defense is that this finding of the appellate court constitutes a bar to the granting of any relief by that court to the petitioners.

Shortly stated, the question is whether, in a complaint filed under R. L. c. 12, § 77 or § 78, the appellate board can make any abatement of a tax where the complainant has not brought in to the assessors a list as required by § 41 of that chapter within the time specified in the notice, and is not found, either by the assessors or by the appellate board or court, to have had any reasonable excuse or good cause for the delay. Although the precise language of the section would seem to be quite decisive, still, inasmuch as the petitioners have made an elaborate argument, based as well upon a laborious comparison of the statutes past and present as upon other considerations, to the effect that the

question should be answered in the affirmative, and inasmuch also as the question is of considerable pecuniary importance to the parties in this case, and moreover is of general importance as one of practice, it seems well to consider it somewhat at length.

It is useful to look into the history of the legislation so far as it relates to the matters involved in the question. In the colony laws there does not seem to have been any provision for the furnishing of lists: and it was provided that if a taxpayer could satisfy the assessors that he was "overvalued" he, in the quaint language of the times, could be "eased" by them, and if they refused he could appeal to the county court; Mass. Col. Laws, (Whitmore's ed.) 23; Anc. Chart. 69, 70; and in the early part of the provincial period, with the exception of the provision contained in the special tax act of 1692-3, c. 41, §§ 5, 6, 1 Prov. Laws, 93, 94; 1694-5, c. 2, §§ 5, 6, 1 Prov. Laws, 167, 168, the law as to the right of abatement seems to have continued substantially the same. Prov. St. 1692-3, c. 28, § 6; 1 Prov. Laws, 66. (Also Anc. Chart. 250.) Prov. Sts. 1692-3, c. 41, § 2; 1699-1700, c. 26, § 8; 1 Prov. Laws, 92, 408. See also Prov. Sts. 1697, c. 6, § 5; 1697, c. 23, § 6; 1698, c. 15, § 5; 1698, c. 24, § 9; 1699-1700, c. 14, § 6; 1 Prov. Laws, 281, 305, 340, 362, 387. But as early as 1715 the annual or special tax acts provided that the assessors before making the assessment should call upon the inhabitants to bring in "true and perfect lists of their polls and rateable estate," and imposed a fine upon any one who should bring in a false list; and this form of legislation continued for a number of years. The bringing in of such a list however was not made a condition precedent to a right to an abatement, either by the assessors or by the county court. Prov. St. 1715-16, c. 11, §§ 4, 5; 2 Prov. Laws, 22. See also, among others, Prov. Sts. c. 1716-17, c. 12, § 4; 1717-18, c. 7, § 4; 1718-19, c. 13, § 5; 1719-20, c. 7, § 4; 1720-21, c. 4, § 4; 1721, c. 4, § 4; 1722-3, c. 8, § 4; 1723-4, c. 8, § 4; 1728-9, c. 14, § 4; 1734-5, c. 13, § 5; 2 Prov. Laws, 57, 85, 117, 148, 179, 217, 256, 298, 515, 735. Compare Prov. St. 1730, c. 1; 2 Prov. Laws, 549.

But in Prov. St. 1735-6, c. 13, § 5; 2 Prov. Laws, 780, there came a radical change. The section is so significant upon the question before us as to justify a liberal quotation of its exact language:

"The assessors . . . in convenient time before their making the assessment, shall give seasonable warning to the inhabitants, . . . [here follows the manner of giving the notice] . . . to give or bring in to the assessors true and perfect lists of their polls and rateable estates; and if any person or persons shall neglect or refuse so to do, or bring in a false list, it shall be lawful to and for the assessors to assess such person or persons according to their known ability in such town, in their sound judgment and discretion, their due proportion to this tax, as near as they can." It imposes a fine of twenty shillings upon each person "convicted by legal proof, in the judgment of the assessors, of bringing in a false list; the said fines to be for the use of the poor of such town or district where the delinquent lives, . . . saving to the party aggrieved at the judgment of the assessors in setting forth such fine, liberty of appeal therefrom to the Court of General Sessions of the Peace within the county, for relief, as in case of being overrated." Then follows this provision: "And if any person or persons shall not bring in a list of their estate as aforesaid to the assessors, he or they so neglecting, shall not be admitted to make application to the Court of Sessions for any abatement of the assessment laid on him."

The language is plain and unambiguous. While it gives the right of appeal from the judgment of the assessors as to the question whether a list is true or false, it distinctly says a person who does not bring in a list shall not be admitted to apply to the court of sessions for an abatement. The refusal of the right to go to the court of sessions for an abatement is accentuated by the fact that upon the question whether a list is false there is an appeal to that court. The whole question of appeal to the court from the judgment of the assessors was before the law-making power and the rights were carefully separated and distinctly defined. Upon one question there was the right of appeal; on the other there was none. Probably the assessors, at least before the committal of their warrant to the tax collector, could have "eased" a taxpayer if they were satisfied that he was "overvalued"; and in considering this question the law presumes that they would act, not capriciously or without restraint, but according to their best judgment and under the obligation of their official oath. But whether their decision

was right or wrong, the taxpayer was bound by it. He was entirely in their hands and at their official mercy.

Thus continued the law for half a century ; and every annual tax act, and every special tax act (so far as disclosed by an examination intended to be reasonably thorough), contained a clause substantially like the one we have just been considering. Prov. St. 1735-6, c. 13, § 5 ; 1736-7, c. 7, § 5 ; 1737-8, c. 14, § 5 ; 1740-41, c. 8, § 5 ; 2 Prov. Laws, 780, 812, 903, 1034 *et passim*. Prov. Sts. 1743-44, c. 9, § 5 ; 1744-5, c. 9, § 5 ; 1748-9, c. 1, § 5 ; 1756-7, c. 1, § 5 ; 3 Prov. Laws, 99, 167, 401, 977 *et passim*. Prov. Sts. 1757-8, c. 2, § 5 ; 1758-9, c. 1, § 5 ; 1759-60, c. 2, § 5 ; 1760-61, c. 11, § 5 ; 1766-7, c. 6, § 5 ; 1767-8, c. 8, § 5 ; 4 Prov. Laws, 16, 155, 262, 397, 898, 972 *et passim*. Prov. Sts. 1769-70, c. 1, § 5 ; 1770-71, c. 7, § 7 ; 1774, c. 8, § 5 ; 1777-8, c. 13, § 7 ; 1779-80, c. 12, § 7 ; 1780, c. 16, § 8 ; 5 Prov. Laws, 19, 105, 408, 758, 1112, 1482. St. 1780, c. 43. St. 1781, c. 16, c. 28. St. 1782, c. 65. St. 1784, c. 25.

It may be remarked in passing that an examination of the provincial statutes above cited shows conclusively that the idea expressed by Metcalf, J., in giving the opinion of the court in *Winnisimmet Co. v. Assessors of Chelsea*, 6 Cush. 477, 481, that "by the provincial statutes . . . a party, aggrieved at the sum apportioned on him by assessors, and being refused an abatement by them, might appeal to the sessions for an abatement, in all cases, as a matter of right," was erroneous so far at least as respects the law after 1735.

The next material change was made by the general statute of 1785, c. 50, § 9, which, after the usual provision for the bringing in of a list to the assessors, provided further that "if any person or persons, shall not bring in a list of their estates, as aforesaid, to the assessors, he, she, or they so neglecting or refusing, shall not be admitted to make application to the Court of General Sessions of the Peace, for any abatement of the assessment so laid on him, her or them ; unless such person or persons shall make it to appear to the said court, that it was not within the power of him, her, or them, to deliver to the assessors respectively, a list of his, her, or their rateable estate, at the time appointed for that purpose." The change made by this statute was not against the taxpayer but was manifestly in his favor. It is to be noted

that this change was made not in a tax act but in a general law relating to assessors, their power and authority. Inasmuch as it was a general law applicable to all taxes there was no further occasion for inserting in each special or annual tax statute a provision on the subject; and an examination of the subsequent tax acts shows that they contain no special provision relating to the right of abatement. See for example Sts. 1787, c. 56; 1788, c. 67 a; 1789, c. 49; 1795, c. 11; 1796, cc. 6, 51; 1797, c. 60; 1805, c. 119.

Except for the substitution of county commissioners for the Court of General Sessions of the Peace as the appellate board, thus stood the law until the Revised Statutes. By Rev. Sts. c. 7, § 40, it is provided that "No person shall have any abatement made by the commissioners, unless he shall have brought in a list of his estate to the assessors, or shall show good cause for not having so done, and unless he shall, if required by the assessors, have made oath to the truth of the same." As originally reported by the commissioners on the revision of the statutes it read thus: "No person shall be entitled to have any abatement made, either by the assessors, or county commissioners, or other officers mentioned in the preceding section [meaning other public officers in the respective counties who by law exercise the powers of county commissioners] unless he shall have brought in a list of his estate to the assessors, or shall show good cause for not having so done." Report of Commissioners on Rev. Sts. c. 7, § 42. In a note to this section the commissioners say that "This provision is submitted for the purpose of removing an ambiguity in the existing law — that is, whether the present act, (1785, c. 50, §§ 9, 10,) which denies abatements in cases where lists are not brought in, authorizes both assessors and county commissioners, or only the latter, to refuse abatements in such cases." The legislative committee to whom the whole report of the commissioners was referred for consideration recommended that the following amendments be made, namely, first that the clause "or other officers mentioned in the preceding section" be stricken out, and by adding at the end of the section "and unless he shall, if required by the assessors, have made oath to the truth of the same." Both amendments were adopted, the first probably because there were

no officers who under the then existing laws held the power of county commissioners as to the abatement of taxes. As thus amended by the committee, the prohibition as to making abatements except under the conditions named in the section extended as well to the assessors as to county commissioners. That was not satisfactory to the Legislature, and that body, with the issue sharply before it, struck out the prohibition so far as respected the assessors, but let it stand only as to the county commissioners, thereby plainly showing its determination that the right to an abatement where no list had been filed should be different before the assessors from that before the appellate board. Previous sections of the same chapter (c. 7) provided that the list should be brought in within the time mentioned in the notice given by the assessors (§ 19); that in the absence of such a list the assessors should estimate the estate (§ 23); and that such estimate should be conclusive upon a person who had not brought in a list unless he could show a reasonable excuse for the omission (§ 24).

In *Winnisimmet Co. v. Assessors of Chelsea*, 6 Cush. 477, it seems to have been thought that under the provisions of this statute it was in the power of the assessors to make an abatement if seasonably asked for, although no list had been carried in. "But," say the court, "after they have refused to make an abatement, the provision is peremptory, that it shall not be made by the county commissioners, (the Court of Common Pleas, in the present cases,) unless a list has been carried in, and sworn to, if required. If a party intends to enter upon a litigation, he must prepare himself by taking the prerequisite measures prescribed by the statute." See also *Porter v. County Commissioners*, 5 Gray, 365, for a full discussion of this subject. It was argued by the petitioners in that case that under St. 1853, c. 319, § 3, it was sufficient to sustain an appeal if the list was given at any time before the application for an abatement. But it was said by Shaw, C. J. (p. 368): "This argument is plausible, but we think not sound. It overlooks a distinction, kept up in these provisions for taxation, between the power of the assessors to abate the tax of an individual, and the right of such individual to appeal from the decision of the assessors to a tribunal, to some extent judicial, originally the court of sessions, now the

county commissioners, to revise the final decision of the assessors. The law seems to have been willing to trust the same board of assessors, who made the assessment originally, to correct any error into which they themselves may have fallen. Knowing the grounds on which they at first proceeded, whether with or without a list given in, if the individual could satisfy them that, in his particular case, they had overrated him, they might make an abatement. But if a party intends to put himself upon his strict rights, and secure a right to appeal to a higher tribunal, who may proceed upon other views of the law, and other evidence of the facts, than those acted on by the assessors, he should put himself right at the outset, by filing his list before an assessment. This distinction is made as well in statutes formerly in force, as in the Rev. Sts." See also *Otis Co. v. Ware*, 8 Gray, 509; St. 1857, c. 306, does not seem to have made any material change in the law affecting this matter.

In Gen. Sts. c. 11, § 46, the law is stated thus: "No person shall have an abatement unless he has filed with the assessors a list subscribed by him of his estate liable to taxation, and made oath that it is full and accurate according to his best knowledge and belief. When such list is not filed within the time specified by the assessors for bringing it in, no complaint from the judgment of the assessors shall be sustained by the county commissioners, unless they are satisfied that there was good cause why such list was not seasonably brought in." In *Charlestown v. County Commissioners*, 101 Mass. 87, 90, it was held that the first branch of this section was intended to be "a peremptory and absolute denial of all right to have an abatement without first filing with the assessors the list under oath," and that under the second branch, even when such a list is filed, if it is not filed within the time specified by the assessors for bringing in the lists, a complaint can be maintained before the county commissioners only when "they are satisfied that there was good cause why such list was not seasonably brought in."

St. 1865, c. 121, providing that, where the list is not filed within the time specified in the notice, the assessors shall not afterwards abate any part of the tax on personal estate unless the tax exceeds by more than fifty per cent the amount which would have been assessed if the list had been seasonably brought

in, etc., has no application whatever to proceedings before the county commissioners. Before this statute, while there was no appeal to the county commissioners where a list had not been filed within the time prescribed in the notice of the assessors, yet the taxpayer by subsequently filing a list could apply to the assessors and they could reduce the tax to its proper size. The plain purpose of this statute was to limit the power of the assessors as to the cases in which they could abate and the amount of abatement they could make. It in no way concerned the jurisdiction of the county commissioners or the right of the taxpayer to appeal to that board.

Gen. Sts. c. 11, § 46, was re-enacted in Pub. Sts. c. 11, § 72, but with the addition of these words, "and except in cases provided for in the following section." The "following section" is substantially like St. 1865, c. 121, except that in the place of the words "they [the assessors] shall not afterwards abate any part of the tax" are found the words "no part of the tax . . . shall be abated." That is to say, the clause applying expressly to the assessors is apparently changed to a clause applicable to any tribunal having jurisdiction of a complaint for abatement. And it is argued with force by the petitioners that under these two sections, namely, §§ 72, 73, a taxpayer had on appeal the same right to be heard by the county commissioners as originally by the assessors, even if he had filed no list within the time prescribed by the notice. As thus construed these two sections would have made a great change in the right of the taxpayer to appeal from the assessors as it had existed in the Province and Commonwealth ever since 1735. These two sections were enacted exactly as reported by the commissioners on the Public Statutes, and there is nothing in their report to show that they intended to change the previous law on this subject. But it is unnecessary to consider whether the view of the petitioners as to the true construction of these two sections is correct. The language of the sections of R. L. c. 12 upon which the case turns is very different.

By § 74 of that chapter it is provided that no person "shall . . . have an abatement, except as otherwise provided, unless he has brought in to the assessors the list of his estate as required by" the notice. And if the list is not filed within the time

specified by the notice, then only a certain prescribed part of the tax shall be abated. The next material section is § 77, the substance of which is stated at the beginning of this opinion.

Whatever doubt may have been thrown upon the law on this subject by the Public Statutes, or whatever interpretation may be given to the sections therein contained as to it, the whole subject seems to have been more carefully considered in the revision of 1902; and the change, if any, made in the former practice by the Public Statutes, was rectified so as to leave the law as it stood previous to the Public Statutes.

There can be no doubt that by the express language of R. L. c. 12, § 77 and 78, when considered in connection with the other provisions of the same chapter and read in the light of previous legislation upon the subject, the county commissioners have no power to abate a tax where the list was not brought in within the time specified in the notice given by the assessors before making the assessment, unless either the assessors or the county commissioners find that there was good cause or reasonable excuse for the delay. The Superior Court has simply the same jurisdiction as the county commissioners (§ 78). It follows that upon the facts found in this case, as hereinbefore stated, the petition should be dismissed.

It becomes unnecessary to consider the other grounds of defense. According to the terms of the report "judgment is to be entered upon the finding in favor of the respondents, with such costs and expenses as they may be entitled to, to be taxed by the Superior Court"; and it is

So ordered.

JAMES S. ALLEN, JR., *vs.* CHICAGO PNEUMATIC TOOL
COMPANY.

Plymouth. March 8, 1910. — May 18, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Contract, What constitutes, Implied in fact, Renewal. *Damages*, In contract. *Election*.
Assignment. *Words*, "Renewal."

In an action for an amount alleged to be due to the plaintiff as compensation for services and commissions, under the alleged renewal of a contract in writing between the plaintiff and the defendant, it appeared that by the contract in

writing the plaintiff was employed by the defendant as a salesman for one year at a yearly salary of \$2,100, and an additional compensation of at least \$1,400 as commissions for the year, with a provision that if either or both parties did not desire to renew the contract notice should be given thirty days before its termination, that the plaintiff worked under this contract for the year, that no notice of a desire not to renew it was given by either party, and that the plaintiff continued his work as before until eight months and a half of the second year had expired, when he was notified by the defendant that on account of financial conditions and the great decrease in business there would be a "discontinuance" of his employment on the next day, that thereupon letters passed between him and the defendant, the plaintiff insisting that his employment was in force until the expiration of the second year and the defendant insisting that the contract had terminated at the expiration of the first year, that the plaintiff notified the defendant that he held himself subject to the defendant's working orders, although he testified that he tried to obtain other employment. The trial judge, who heard the case without a jury, found for the plaintiff in a sum which was substantially the amount claimed by him. *Held*, that from the fact that no notice was given before the expiration of the first year the judge had a right to infer that there was a disposition to renew the contract, and that, from the additional fact that the plaintiff, without any other express arrangement either written or oral, continued to work as before with the full knowledge and approbation of the defendant, the judge properly could infer that it was the understanding of the parties that the contract was renewed; and that such renewal was a hiring of the plaintiff for a second year upon the terms of the contract in writing, with the same right in either party to give notice within thirty days of its expiration that there was no further desire for renewal.

If a salesman, whose employment has been terminated by his employer before the expiration of the term for which he was employed, and who, instead of treating the contract as broken and suing for damages for the breach, notifies his employer that he regards the contract as still in force and holds himself in readiness to work under it, makes, before the term of the contract has expired, an assignment in writing of all claim which he then has or may thereafter have against his employer for sums due him for services and commissions as salesman "whether such claim for services and commissions have accrued, or may hereafter accrue under the written agreement" made by him with his employer or under any oral renewal thereof, this is not an assignment of a claim for damages for a breach of the contract, but is an assignment of all sums then due to him or which may thereafter become due to him for services and commissions under his contract with his employer, and is valid in assigning future compensation to become due under an existing contract.

CONTRACT by the assignee of all claims of Orrin S. Hammack against the defendant for compensation for services and for commissions as salesman under the manager of the defendant's stone tool department, accrued or to accrue under a renewal of an agreement in writing between Hammack and the defendant dated February 15, 1906, for the amounts thus due to Hammack, which he was alleged to have assigned to the plaintiff by an instrument in writing dated January 4, 1908. Writ dated April 8, 1908.

The contract between the defendant and Hammack, of which a copy was annexed to the declaration, was as follows :

“ Memorandum of Agreement made and entered into this 15th day of February, 1906, by and between Chicago Pneumatic Tool Company, party of the first part, hereinafter called first party, and O. S. Hammack, party of the second part, hereinafter called second party.

“ First party agrees to employ second party for a period of one year from Feb. 15th, 1906, as salesman under the manager of the Stone Tool Department of Chicago Pneumatic Tool Company covering Maine, New Hampshire, Vermont, Massachusetts and Rhode Island.

“ Second party agrees to report to and carry out the instructions of the management of the Company, and to devote his entire time, energy and ability to the furtherance of the business interests of the Company.

“ First party agrees to pay as salary to second party the sum of Twenty-one hundred dollars (\$2100.00) per year, payable in equal monthly instalments at the end of each month. Second party is to be allowed ordinary traveling expenses incurred in the interest of the Company. As a further consideration, second party is to receive a commission of three per cent. (3%) on stone tools including accessories, and one per cent (1%) on compressors and rock drills including accessories sold by first party in the States of Maine, New Hampshire, Vermont, Massachusetts and Rhode Island; this commission to be paid quarterly, payable on the 20th day of the month succeeding the end of each quarter. Statements to be based on collections with the understanding that no commissions become due until collections are made for sales. In the event that commissions on sales of stone tools, compressors and rock drills in the above mentioned states do not amount to a net total of Fourteen hundred dollars (\$1400.00) for the year, then first party agrees to make good such deficiency to the second party, payable in cash at the end of the year.

“ Second party agrees to use his influence whenever possible to the furtherance of the sale of all tools and air compressors sold by the first party to railroads, manufacturers and other customers not included in the stone tool trade above mentioned,

for which service second party is to receive no further compensation or commission.

"It is further agreed that in the event that either or both parties do not desire to renew this agreement at the time of its expiration that notice be given in writing of intention not to renew at least thirty (30) days prior to the expiration of this agreement.

"In Witness Whereof said parties have affixed their hands and seals at the City of Chicago, State of Illinois, on the date and year aforesaid.

"Chicago Pneumatic Tool Company

"J. W. Duntley

President

"Attest, S. W. Prince

[Seal]

Secretary.

"O. S. Hammack" [Seal].

The assignment from Hammack to the plaintiff, of which a copy was annexed to the declaration, was as follows :

"That I, Orrin S. Hammack, of Quincy, Massachusetts, in consideration of one dollar and other valuable considerations to me paid by James S. Allen, Jr., of Brockton, Massachusetts, hereby assign, transfer and set over unto the said James S. Allen, Jr., all claim which I now have or may hereafter have against the Chicago Pneumatic Tool Company due me for services and commission as salesman under the manager of the Stone Tool Department of said Company whether such claim for services and commissions have accrued, or may hereafter accrue under a certain written agreement made by me with said Company dated February 15, 1906, or under any oral renewal thereof.

"To Have and To Hold the same to James S. Allen, Jr., his executors, administrators and assigns to their own use and behoof forever.

"In Witness Whereof I hereunto set my hand and seal this fourth day of January A. D. 1908.

"Orrin S. Hammack" [Seal]

In the Superior Court the case was tried before *Raymond, J.*, without a jury. The facts which were shown by the evidence

are stated in the opinion. The amount of the plaintiff's claim as stated upon an account annexed was \$3,650.61.

At the close of the evidence the defendant asked the judge to make the following rulings:

- "1. On all the evidence the plaintiff is not entitled to recover.
- "2. The failure of both plaintiff and defendant to notify the other of their intention not to renew the contract did not operate to renew it, either for a year or any other period of time.
- "3. If the contract was renewed for any period of time after February 15, 1907, it was with the right to the defendant to cancel it at any time upon thirty days' written notice, and the plaintiff can recover, if at all, only for salary and commissions for a period of thirty days after October 29, 1907.
- "4. The terms of the assignment under which the plaintiff sues do not include any right of his assignor to recover damages against the defendant for breach of the written contract.
- "5. The plaintiff can recover under said assignment, if at all, only the commissions due for the first year, as the commissions due for the second year are not apportionable.
- "6. The assignment not including all the claims Hammack had against the defendant at its date, it follows that the plaintiff can recover nothing under it, as the plaintiff never assented to said assignment."

The judge refused to make any of these rulings, and found for the plaintiff in the sum of \$3,521.39, with interest from the date of the writ. The defendant alleged exceptions.

The case was submitted on briefs.

H. T. Richardson, for the defendant.

G. W. Abele, for the plaintiff.

HAMMOND, J. The main questions are first what was the nature of the contract under which Hammack, the plaintiff's assignor, was at work at the time he received notice of his dismissal, and second, what was the nature of the assignment.

1. The only written contract was that of February 15, 1906. By this contract the defendant agreed to employ Hammack, the plaintiff's assignor, for a period of one year from its date, and to pay him as salary \$2,100 "per year" payable in equal monthly instalments at the end of each month, and also to pay him a certain commission upon certain sales, "this commission to be paid

quarterly, payable on the 20th day of the month succeeding the end of each quarter." It is further provided that if this commission does not amount "to a net total of fourteen hundred dollars (\$1400) for the year," then the defendant is "to make good such deficiency" to Hammack, "payable in cash at the end of the year." The last paragraph is in the following language: "It is further agreed that in the event that either or both parties do not desire to renew this agreement at the time of its expiration that notice be given in writing of intention not to renew at least thirty (30) days prior to the expiration of this agreement." In short, this was a contract for one year from its date, at a yearly salary of \$2,100, with an additional compensation of at least \$1,400 as commissions for the year, with a provision that if either or both parties did not desire to renew it notice should be given thirty days before its expiration.

Hammack worked under the contract for the year. No notice of a desire not to renew was given by either party, and Hammack, after the expiration of the year, continued his work as before until October 30, 1907, when he was notified by the defendant that on account of financial conditions and the great decrease in business there would be a "discontinuance" of employment as to him on the next day. Thereupon letters passed between him and the defendant as to this matter, the former insisting that his contract was in force until February 15, 1908, and the latter that the contract had terminated on February 15, 1907. From the fact that no notice was given before the expiration of the first year the trial judge had the right to infer that there was a disposition to renew the contract, and from the additional fact that Hammack without any other express arrangement, either written or oral, continued to work as before, with the full knowledge and approbation of the defendant, the judge could properly infer that it was the understanding of the parties that the contract was renewed. If renewed, then the new contract, like the old, was a contract of hiring for a year, with compensation for the year, to be paid quarterly as before, with the same right in either party to give notice within thirty days of its expiration that there was no further desire for renewal. Any other contract would not have been a "renewal" of the original contract. The evidence amply justified a finding that

at the time the plaintiff was dismissed he was working under a contract for the year beginning February 15, 1907. *Dunton v. Derby Desk Co.* 186 Mass. 35, and cases cited. *Maynard v. Royal Worcester Corset Co.* 200 Mass. 1. In this last case there is a quite full discussion of the law bearing upon this subject, and we need only to refer to it for a statement of the underlying principles.

2. What is the nature of the assignment from Hammack to the plaintiff? It is dated January 4, 1908, which was some weeks before the expiration of the second year. At that time there was due to Hammack all arrears of salary and of commissions up to that time, and the second contract was still binding upon the defendant. Upon the breach of the contract by the defendant there were before Hammack at least two courses. He either could regard the contract as broken and at once sue for damages for the breach, or he could hold himself out as ready to work under it, wait until the expiration of the year and then sue for compensation as fixed by the contract less reasonable deduction of what he could have earned. There was evidence that he intended to take the latter course, for he notified the defendant that he held himself subject to their working orders up to February 15, 1908. And although he testified that he endeavored to seek other employment, yet the trial judge could well find upon the evidence that he intended to hold the defendant as liable for the compensation by the terms of the contract, and not merely to sue thereon in damages for the breach.

Under these circumstances the assignment was made. It covers "all claim which I now have or may hereafter have against . . . [the defendant] . . . due me for services and commission as salesman . . . whether such claim for services and commissions have accrued, or may hereafter accrue under a certain written agreement made by me with said Company dated February 15, 1906, or under any oral renewal thereof." It does not purport to be an assignment of a claim for damages for breach of the contract. In a word it was simply an assignment of all sums then due under both contracts with whatever afterwards should become due for services and commissions (which were in the nature of future earnings) under the renewal contract which was then existing. Such an assignment is valid according to

its terms. *Citizens Loan Association v. Boston & Maine Railroad*, 196 Mass. 528, and cases cited. It is to be noted also that the declaration in this case proceeds upon this theory as to the nature of the assignment. It makes no claim except under the terms of the contract. The assignment of the sums due for services and commissions must be held to include also interest accrued or to accrue. It follows that the rulings requested were all properly refused.

Exceptions overruled.

CONGRESS INVESTMENT COMPANY vs. ROBERT REID.

Suffolk. March 3, 1910. — May 18, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Mortgage, Of personal property. Attachment, Of mortgaged personal property. Notice.

In an action brought by a mortgagee of personal property against an officer who had attached the property under R. L. c. 107, §§ 69, 70, for its alleged conversion, it appeared that, on the day after the attachment, the plaintiff in attempting to make a demand in writing under § 70 had delivered to the defendant a notice which did not apply to the goods under attachment and stated an amount which was not a just and true account of the amount due under the mortgage, and that, on the twenty-ninth day after the attachment, the plaintiff had given the defendant a demand in writing stating a just and true account of the debt for which the property was liable to him, which the defendant contended was not given in time. There was evidence upon which the jury might have found that the plaintiff when he gave the first notice supposed that it was good, that the errors were made inadvertently and with no intention to mislead, that as soon as the plaintiff became aware that the notice was bad he took measures to give a second notice and that this was given with reasonable promptness after the plaintiff discovered the mistakes in the first notice, that the delay on the part of the plaintiff was with no intent to injure or prejudice the defendant in any way and was due entirely to inadvertence, and that no rights had intervened between the time of the attachment and the time of the second notice. There also was evidence of the plaintiff from which the jury might have found further that it was from the first the determination of the attaching creditor, under whose directions the defendant was acting in making the attachment, to hold the property "anyhow" whether there was any mortgage on it or not, and to take his chances of being compelled to pay the mortgage debt, that the value of the property was less than the amount of the mortgage and from this and other circumstances it might have been inferred that the delay was in no way prejudicial to the defendant and that he had done nothing which he would not have done if the notice had been given sooner. *Held*, that it could not have been ruled as matter of law that the notice was not given in time, and also that a verdict for the plaintiff was warranted.

TORT by the Congress Investment Company, a corporation, against Robert Reid, a constable of the city of Boston, for the alleged conversion of certain goods and chattels covered by a mortgage held by the plaintiff and attached by the defendant in an action brought by one Charles P. George against Raymond Hayes, the mortgagor, the plaintiff alleging that it gave to the defendant as the attaching officer a just and true account in writing of the debt due to it under the mortgage in compliance with the provisions of R. L. c. 167, §§ 69, 70. Writ in the Municipal Court of the City of Boston dated November 15, 1907.

On appeal to the Superior Court the case was tried before *Sanderson, J.* The mortgage under which the plaintiff claimed title was dated July 16, 1907, and was properly executed and recorded. It was for \$97.60, without interest. The writ in *George v. Hayes*, under which the defendant made the attachment, was dated September 9, 1907, and the attachment was made on September 23, 1907. Judgment was obtained in that action on November 1, 1907, and execution issued on November 5, 1907.

In the action of *George v. Hayes* the mortgagee was not summoned as trustee, and the goods in question were in the possession of the mortgagor at the time of the attachment. It was admitted in evidence that the defendant Hayes had notified the plaintiff in this action of the attachment on the day that it was made by informing the attorney of the plaintiff at his office, that the attorney, upon receipt of the notice of the attachment, on the day following, that is, on September 24, 1907, sent a notice of a mortgage to the attaching officer, called in the opinion the first notice, which it was admitted was received on that day by the officer who turned it over to the attaching creditor, who turned it over to his attorney.

There was evidence tending to show that upon investigation at the city clerk's office of the city of Boston it was found that the mortgage described in the notice did not apply to the goods under attachment, that the goods were not returned to the plaintiff, nor was the amount claimed to be due on the mortgage, nor any portion thereof, paid at any time after the giving of the notice but that there was a mortgage on record running from

Hayes to one Phillips covering goods other than those under attachment, in the amount of \$150 and interest, the rate not disclosed.

The attaching officer, the present defendant, removed the goods from the premises on September 28, 1907, and put them in a place of storage, where so far as appeared they had remained ever since.

It was stated in evidence by one of the plaintiff's witnesses that the plaintiff's attorney had made a mistake in sending the notice of September 24, 1907, that he had taken the wrong account from the ledger and that it was not a true account of the mortgage on the goods under attachment, and that the treasurer of the plaintiff had signed the notice without reading it or verifying it to see whether it was correct or not.

It further was shown in evidence that on October 14, 1907, the plaintiff's attorney sent a letter to the defendant's attorney and that a second notice was given to the attaching officer on October 22, 1907, which contained a just and true account of the debt or demand.

The defendant in his answer justified under the writ and execution in the action of *George v. Hayes*. He alleged that the notice of September 24, 1907, served by the mortgagee upon him falsely stated the name of the mortgagee and overstated the amount due on the mortgage, and was grossly misleading and was an injury and was not such a notice as would enable him, or the attaching creditor, to act understandingly in regard to the claim of the mortgagee, that the letter of October 14, 1907, if found to be in time, was still further misleading as it referred to the same mortgage mentioned in the first notice of September 24, 1907, and that the second notice of October 22, 1907, was faulty in point of time, not having been given until twenty-nine days after the attachment and twenty-nine days after the plaintiff had received notice of it, and twenty-four days after the goods had been removed to a place of storage and the attaching creditor was already prejudiced by the misleading demand made by the mortgagee and had been put to the expense of moving and storing the goods and other legal expenses.

The first notice referred to above was as follows:

" Boston, Mass., Sept. 24th, 1907.

" Robert Reid, Esq., Constable of Boston :

" You are hereby notified that the office furniture, rug, table, chairs and book case now located in the office of the New York Life Ins. Co., Oliver Building, Milk St., Boston, held by you under attachment as the property of Raymond Hayes are incumbered by a certain mortgage given to me by Raymond Hayes, duly recorded in the records of the City Clerk of the said Boston to secure several promissory notes amounting to \$177.60, and I hereby demand the said sum of \$177.60 with interest thereon at six per cent per annum from the date of said mortgage, being the amount due and remaining unpaid and for which said property is liable to me under said mortgage.

" Solomon Phillips,
Mortgagee."

The letter referred to above was as follows :

" Boston, Mass., October 14th, 1907.

" Mr. H. Douglass Campbell,
8 Beacon St., Boston.

" Dear Sir :

" Mr. C. P. George has referred me to you as his attorney with reference to a claim which I have in favor of Solomon Phillips.

" About a month ago, George removed mortgaged property belonging to Raymond Hayes, upon which Phillips held a mortgage, amounting to \$97.60 and interest from July 16th, 1907, which mortgage is on record. Please let me know at once whether your client will adjust the same or not as I am desirous of bringing this matter to a head at once, so that it may be adjusted before the action of George *vs.* Hayes is tried on Wednesday next.

" Sincerely yours,

" T. J. Barry."

The second notice referred to above was as follows :

" Boston, October 22d, 1907.

" To Robert Reid, Constable City of Boston.

" Sir :

" You are hereby notified that the office furniture and personal property held by you under attachment as the property of

Raymond Hayes are incumbered by a certain mortgage given by said Hayes to the Congress Investment Company, dated July 16th, 1907, and duly recorded in the records of the City Clerk of said Boston, to secure a promissory note for \$97.60. And I demand the sum of \$97.60 with interest thereon, at the rate of six per cent per annum, from the date of said mortgage; being the amount due and remaining unpaid and for which said property is liable to said company under said mortgage.

“Congress Investment Company,

[Seal of

By Solomon Phillips, Treas.”

Congress Investment
Company]

Phillips, the treasurer of the plaintiff, testified to a conversation by telephone which he had with George, the attaching creditor, as follows: “Told him that he was taking the stuff away where we held a mortgage. This company holds a mortgage on the stuff,—and he told me over the telephone that Mr. Hayes has owed him money on a note and he was going to get square with him,—going to take the stuff anyway,—going to get the stuff away anyhow and going to hold on to it.”—Q. “That was the time you had the mortgage on the property?” A. “Exactly.”—Q. “Did you tell him the amount of your claim?” A. “Yes. I told him that if he would give me \$97.60 he could have the stuff. I didn’t want the stuff provided the company got what was coming to them.”—Q. “Did you tell him \$97.60 was the amount of your claim?” A. “Yes, \$97.60.” Q. “Did he say anything to you then?” A. “He said, ‘If I have to pay it I will pay it.’”

George denied that he had such a conversation with Phillips or with any one.

At the close of the evidence, the defendant asked the judge to rule that on the evidence the plaintiff could not recover. The judge refused to make this ruling, and the defendant excepted. The defendant also asked the judge to make the following rulings:

“1. If the plaintiff does not show that the attaching creditor was not prejudiced by the overstating of the amount and the misstatements contained in the notice of September 24, 1907,

the demand is void and the attachment is good against the mortgagee.

"2. It cannot be said that the defendant was not misled to his pecuniary loss and the plaintiff cannot be relieved from the consequence of his misleading demand.

"3. The defendant has shown that he was pecuniarily injured by the misstatement contained in the notice of September 24, 1907, and had been put to the expense of removing the goods and the plaintiff cannot be relieved of the consequences.

"4. The notice of October 22, 1907, was not given within a reasonable time and therefore the plaintiff cannot maintain his action.

"5. If the first notice is disregarded and the plaintiff stands on the second notice it is insufficient in point of time it not having been given until twenty-nine days after the attachment and until the defendant had removed the goods to a place of storage."

The judge refused to make any of these rulings, although it was held by this court that he gave in substance the ruling numbered one in the requests of the defendant. The judge submitted the case to the jury with other instructions, which included the following:

"I have been asked to give several rulings by the defendant. One is 'that the notice given on September 24th was not a proper notice under the statute and was inoperative to defeat the attachment.' That I give. Neither side claims that it was;

"'That if the notice of September 24 was insufficient to give the attaching creditor such information as would enable him to act understandingly in regard to the claim, the plaintiff cannot maintain his action, the question of reasonable diligence, where the facts are agreed, is a matter of law.' If the plaintiff gave an invalid notice, by the giving of the second notice which complied with the statute and was valid in all respects, it can recover in this action. That is, the fact that it gave an invalid notice would not prevent its recovery if it later gave a valid and sufficient notice. If the plaintiff gave a notice to the defendant which did not contain a true and just account, and if the plaintiff satisfies you that the mistake was inadvertent and made

through an honest mistake, and was not intended and did not mislead the defendant and thereafter the plaintiff gave the defendant a second notice which complied with the statute and contained a just and true account of the amount due upon its mortgage, the plaintiff can recover. If the plaintiff by inadvertence gave a first notice which did not contain a true and just account of whatever was due it, and the plaintiff thereafter gave the defendant a second notice which contained a true and just account of what was due it, and the defendant was not prejudiced by the giving of the first notice, the plaintiff can recover. I will read a word more in regard to this question of reasonable diligence and time. The statute has prescribed no time within which the demand shall be made and the account stated. The general [and] only rule seems to be that of reasonable diligence on the part of the mortgagee in asserting his lien and giving the proper notice thereof. What is reasonable diligence will depend in some degree upon the circumstances peculiar to each case. While on the one hand early knowledge on the part of the mortgagee that the property has been attached will require more speed in the making of the assertion of his right,—so, on the other hand, if the attaching creditor or the officer has, through the mortgagee, though informally, actual knowledge of the mortgage and lien, this fact will be entitled to some consideration on the question whether the mortgagee has lost his lien by an unreasonable delay in making that formal demand and statement of his claim which the statute requires. If the rights of the parties had not changed, so that new rights had come in by other parties,—perhaps this is repetition,—that is, if the officer still held control of the property and there was nothing that had been done by the Congress Investment Company in its previous notice or in any other way to the prejudice of the creditor or the attaching officer,—if the relations of the parties remained the same at the end of thirty-two days when the second notice was given that they were the day after the attachment, then I rule as a matter of law that the thirty-two days is not such an unreasonable delay as will defeat the rights of the Congress Investment Company to recover under its notice:—unless there are some questions in the case, some facts in the case, that change the rights of the parties or that injuriously affect them,

brought about by the act of the Congress Investment Company, then the notice was given, so far as that point is concerned, within a reasonable time. Your verdict will either be for the defendant, or for the plaintiff for the value of the property, unless that value exceeds the amount due on the mortgage note, and interest, in which case it will be the amount due on the mortgage note and interest. Counsel calls my attention to the fact that his note does not call for interest, so if that question arises, the only question to be considered will be interest from the date of the writ."

The jury returned a verdict for the plaintiff in the sum of \$85.80; and the defendant alleged exceptions.

The case was submitted on briefs.

H. D. Campbell, for the defendant.

T. J. Barry & B. Dellheim, for the plaintiff.

HAMMOND, J. Two notices were given, the first on September 24, 1907, and the second on October 22 of the same year. At the trial it appeared that the mortgage named in the first notice did not apply to the goods under attachment, and that the amount stated in the notice was not a just and true account of the amount due the mortgagee; and therefore, in consonance with the contention of the defendant and the concession of the plaintiff, the judge ruled that the notice was bad. The case was submitted to the jury upon the validity of the second notice.

Inasmuch as the plaintiff did not contend that the first notice was good, the objections to it are of importance only as they bear upon the validity of the second notice. And this bearing of the first notice upon the validity of the second arises not simply out of the fact that the first paper was a notice but from the fact that it was an act of the plaintiff. The cases cited by the defendant are cases where the plaintiff has relied only upon the notice alleged therein to have been invalid, and they have only the most remote bearing in a case like this, where the plaintiff does not rely upon the notice containing the defects but upon another and different one. It is well to have this distinction in mind in considering the validity of the second notice.

The objection urged against the validity of this notice is that it was not given in time. No time within which notice must be given is prescribed by the statute, but it must be given within

a reasonable time after the attachment. *Johnson v. Sumner*, 1 Met. 172. "What is reasonable diligence will depend . . . upon the circumstances peculiar to each case. While, on the one hand, early knowledge, on the part of the mortgagee, that the property has been attached, will require more speedy assertion of his rights; so, on the other hand, if the attaching creditor, or the officer, has, through the mortgagee, though informally, actual knowledge of the mortgage, and the nature and extent of the lien acquired thereby, this fact will be entitled to some consideration on the question whether the mortgagee has lost his lien by unreasonable delay in making that formal demand and statement of his claim, which the statute requires." Dewey, J., in *Legate v. Potter*, 1 Met. 325, 326, 327.

The jury might have found upon the evidence that the plaintiff supposed that the first notice was good, that the errors were inadvertently made with no intention to mislead, that as soon as the plaintiff became aware that the notice was bad it took measures to give a second notice, and that this was given with reasonable promptitude after it discovered the mistakes in the first, that the delay on the part of the plaintiff was with no intent to injure or prejudice the defendant in any way, but was due entirely to inadvertence, and that no new rights had intervened between the attachment and the notice. And, if they believed the plaintiff's version of the telephonic conversation between its treasurer and the defendant, they might further have found that it was from the first the determination of the attaching creditor, in accordance with whose directions the defendant was acting, to hold the property "anyhow" whether there was any mortgage upon it or not, and take his chances of ever being required to pay the mortgage debt. And they might have found further, as a fair inference from these findings and from the other circumstances of the case, including the fact that the value of the property was less than the mortgage debt, that the delay was in no way prejudicial to the defendant, and that he did nothing which he would not have done had the notice been sooner given. Upon such findings it could not have been ruled as matter of law that the notice was not given in time. The second, third, fourth and fifth requests were therefore properly refused. *Johnson v. Sumner*, 1 Met. 172 (in which the case for the plaintiff was much weaker

than in the present case). *Legate v. Potter*, 1 Met. 325. See also *Clark v. Dearborn*, 103 Mass. 335, and *Rowley v. Rice*, 10 Met. 7. The first request was sufficiently covered by the charge. The case was submitted to the jury under instructions favorable enough to the defendant.

Exceptions overruled.

ARTHUR I. NEWHALL vs. ENTERPRISE MINING COMPANY.

Suffolk. March 3, 1910. — May 18, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Res Judicata. Contract, Rescission. Fraud.

The question, whether the cause of action in an action at law is essentially the same as that in a suit in equity, previously brought, which after a hearing upon the merits was dismissed, so that the final decree in the suit in equity is a bar to the later action at law as to every issue in the earlier suit that in fact was or in law might have been litigated, is not determined solely by the fact that both the suit in equity and the action at law originated in the same series of transactions and in conversations and communications which took place between the parties concerning them.

The plaintiff in a bill in equity against a mining corporation alleged that one W., who was the promoter, treasurer and a director of the defendant, by false and fraudulent representations of fact induced the plaintiff to purchase certain of the capital stock of the defendant which it owned, and sought a rescission of the purchase and a return of what he paid therefor. At the hearing of the suit upon its merits the plaintiff for the first time discovered from admissions of officers of the defendant that only about one third of the stock which had been sold to him was stock which the defendant had owned and the proceeds of the sale of which had gone into its treasury. The judge who heard the suit found that the plaintiff had not established his allegations of fraud, and that at any rate his suit was brought too long after the sale, and dismissed the bill. Thereafter the plaintiff elected to rescind the sale and brought an action at law to recover back what he had paid for the stock to the defendant's agent because, while he had agreed to purchase stock owned by the defendant, the proceeds of the sale of which would have gone into the corporation's treasury, only one third of the stock which the defendant's agent had sold to him was what he had agreed to purchase, the remaining being stock of the agent himself, the proceeds of the sale of which did not go to the corporation. The defendant set up as a defense the final decree in the suit in equity, and the judge, who heard the case without a jury, ruled that the defense was adequate and found for the defendant. Upon exceptions by the plaintiff, it was *held*, that the decree in the suit in equity was not a bar to the action at law, since, although the different causes of action related to the same transaction, they were founded upon differ-

ent features of it which had no necessary relation to each other and were very different in their nature.

One, who through an agent of a corporation has bought shares of the capital stock of the corporation which it has in its treasury, cannot be compelled without his knowledge and against his will to receive and retain stock that belongs to the agent personally, thus leaving himself and the corporation without the benefit for corporate use of the money, which the corporation would have received from him if its agent had done his duty.

KNOWLTON, C. J. One Woodin was the promoter, the treasurer and a director of the defendant mining corporation, whose capital stock was ten thousand shares, of a par value of \$100 each. Of these shares ninety-three hundred and ninety-one had been issued to Woodin in payment for his interest in certain mines, nine shares had been issued to other corporators, and six hundred shares were not issued nor subscribed for. Woodin conveyed one thousand of his shares to one Prince as a trustee for the corporation, under a stipulation, agreed to by the board of directors, that he, Woodin, should be appointed the fiscal agent for the sale of them or of any portion of them, with authority to take a commission of not more than thirty-three and one third per cent from the selling price, this selling price to be such as the board should determine, and the proceeds of the sales to be placed in the treasury of the corporation, to be expended in the discretion of the directors, with a proviso that the balance due upon the bond given for the purchase price of the mining property should be paid in accordance with its terms. Woodin, as agent for the defendant, contracted to sell to the plaintiff and the plaintiff's wife stock belonging to the company at three different times, amounting to one hundred and thirty-four shares in all, for thirty-three and one third dollars per share. The plaintiff's wife has deceased and the plaintiff has succeeded to her rights. The plaintiff brought a bill in equity against the defendant, alleging that these sales were made upon false representations by Woodin of matters of fact, which, if true, would have shown that the stock was very valuable, and that the purchases were made by the plaintiff and his wife in reliance upon these false and fraudulent representations. He attempted to rescind the contracts on account of these alleged frauds, and to obtain a decree for a return of the money paid to Woodin for the defendant. Upon a hearing in the Superior

Court this bill was dismissed on the ground that the alleged frauds were not sufficiently supported by evidence, and that, if they were, the plaintiff had delayed too long before attempting to rescind the contracts.

Subsequently the plaintiff brought this action at law on the ground that all the sales, according to their terms, were of a part of the one thousand shares of stock belonging to the defendant and held by the trustee, called in the plaintiff's declaration treasury stock, and that the plaintiff and his wife paid Woodin for this stock, and that Woodin, in executing the contract, failed to deliver the defendant's stock, except to the amount of forty-five shares, and delivered his own stock instead. For this reason, as the property was not that which the plaintiff bought, he elected to rescind the contract and reclaim the money paid to the defendant's agent, which this agent had never paid over to his principal, but had kept as his own. The defendant's answer was a general denial, and a plea of *res judicata* founded on the decree dismissing the bill in equity. At the hearing the judge * made the following finding: "In the above action, the court finds for the defendant. I find the defendant's agent did not represent that he was selling any of the original treasury stock of six hundred shares, but he agreed to sell the syndicate stock referred to in the bill in equity held in trust by James P. Prince, and that the plaintiff agreed to buy such stock; that for relief for any misrepresentations by Woodin in such sale the plaintiff could have obtained a remedy in the bill in equity referred to in the answer, and should have sought it by the proper allegations in the bill." This so called syndicate stock was the one thousand shares above referred to. The plaintiff made many requests for rulings, and the case comes before us on his exceptions to the refusal of the judge to grant them.

The finding indicates a decision by the judge that the dismissal of the bill in equity was a bar to this suit. The argument of the defendant's counsel upon the exceptions before us was upon this ground only. It therefore becomes necessary to compare the two suits and determine whether they are for the same cause of action.

* Hardy, J.

It is not contended that the principal issue presented in the present case was decided in favor of the defendant in the suit in equity. Indeed, the matter relied upon by the plaintiff as his cause of action in this case was not averred or put in issue in the former suit. The plaintiff testified, and the other evidence tends to corroborate him, that he did not know the facts upon which he now relies until he discovered them during the former trial.

The defendant relies upon the principle that, as between the same parties, a judgment on the merits in an earlier suit is a bar to a later suit for the same cause of action as to every issue that in fact was, or in law might have been, litigated. *Foye v. Patch*, 132 Mass. 105, 110. *Newburyport Institution for Savings v. Puffer*, 201 Mass. 41, 46. It is to be noted that the proposition is limited to a suit for the same cause of action. As was said in *Norton v. Huxley*, 13 Gray, 285, 290, and in *Harlow v. Bartlett*, 170 Mass. 584, 592, it does not follow that the causes of action in two cases are the same because they "both originated in the same series of transactions, and in the conversations and communications which took place between the parties concerning them." On the other hand, it does not follow that they were not the same because there is a difference in the form of stating them, or an omission in the statement of one to include one or more of the matters that are merely incidental or in aggravation of damages. The question is whether the substantive causes of action relied on are essentially the same, not whether they grow out of transactions which occurred at the same time and had a close relation to one another.

The plaintiff's claim in his bill in equity was founded entirely on the defendant's alleged fraudulent representations made as inducements to contracts of purchase. The claim in the present case is for a failure to perform a contract according to its terms, and for a performance which was so far a departure from the contract as to justify the plaintiff in rescinding it altogether. The cause of action in the first suit, while cognizable at law was one proper for jurisdiction in equity. The right which the plaintiff seeks to enforce in this action is strictly legal, and cannot be made the subject of a suit in equity. The evidence required to support the cause of action in the present suit is very

different from that required to maintain a suit in equity. Although the different causes of action relate to the same transaction, they are founded upon different features of it, which have no necessary relation to each other and which are very different in their nature. The present suit depends entirely upon a contractual right, and the liability of the defendant rests solely upon a breach of contract. The case is like *Allen v. Storer*, 132 Mass. 372, in that it could not have been made the foundation of a suit in equity. It is like *Norton v. Huxley*, *Harlow v. Bartlett* and *Newburyport Institution for Savings v. Puffer*, *ubi supra*, in that the decision in the previous bill in equity is not a bar to the maintenance of the plaintiff's present claim. The principal ruling requested by the plaintiff on this branch of the case should have been given.

We do not deem it necessary to consider the plaintiff's requests for rulings in detail. It is plain that the plaintiff, who bought the stock of the defendant, which it had in its treasury, could not be compelled, without his knowledge or against his will, to receive and retain stock that belonged to another party, thus leaving himself and the corporation without the benefit of the money, for corporate use, which the defendant would have received from him if its agent Woodin had done his duty.

While the evidence strongly indicates that the plaintiff is entitled to recover, we do not think the case is exactly within the plaintiff's request that a judgment be directed in his favor under the St. 1909, c. 236, § 2.

Exceptions sustained.

P. H. Kelley, for the plaintiff.

S. H. Tyng, for the defendant.

ROBERT D. PORTER vs. NEW YORK, NEW HAVEN, AND
HARTFORD RAILROAD COMPANY.

Norfolk. March 3, 1910. — May 18, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Contract, Consideration, Validity. Duress.

Where the owner of a coal business and his predecessor in title have enjoyed for about twenty-nine years the use of certain side tracks, maintained and operated for them by a certain railroad company and its predecessor and connecting with its main lines, but there has been no contract or agreement as to the duration of the privileges so enjoyed, and the railroad company threatens the coal dealer that it will take out his switch and throw him out of business unless he will sign a contract in writing providing that in consideration of the railroad company's continuing to maintain and operate such side tracks, the coal dealer will assume all risks to buildings owned by him by reason of fire communicated thereto by locomotives of the company, and because of such threat the coal dealer signs the contract "under protest," such a contract is supported by a good consideration and is not invalid by reason of the threat of the company, and it therefore is a bar to an action by the coal dealer against the railroad company for damages resulting from the burning of coal sheds of the dealer caused by sparks communicated from a locomotive of the company.

TORT with a declaration containing eight counts, the first six and the eighth counts seeking recovery for damage to wood, timber and grass lands of the plaintiff and to buildings thereon, alleged to have been caused by fire communicated thereto at various times in 1904 and 1905 from sparks from locomotive engines of the defendant. The seventh count sought recovery for the burning on August 29, 1904, of certain coal sheds of the plaintiff. Writ dated December 22, 1906.

The case was tried before Fox, J. By agreement of the parties, judgment was entered for the plaintiff in the sum of \$125 without costs as to all but the seventh count. As to that count, it was agreed that the damage therein alleged came within the terms of a contract, hereinafter described, and that the plaintiff could not recover if that contract was valid.

By the contract referred to, the defendant had agreed in substance to maintain a side track running to the coal sheds of the plaintiff "in consideration whereof" the plaintiff and his wife

had agreed, among other things, "to assume all risks to buildings and contents owned by them and located on said side track, by fire communicated by locomotives of the first party, by sparks or otherwise, and waives and hereby releases said party from all claims that may arise from such damages and agrees to indemnify it and hold it harmless from or on account of any claim that may be made from any insurer or other person on account of such damages."

The plaintiff testified that, previous to the making of the contract, he had enjoyed the same privileges which were his under the contract; that those same privileges had been enjoyed by his father from 1875 until his death in 1892, and since then by the plaintiff; that his father first had been given the privileges by the Old Colony Railroad Company as one of the inducements to cause him to change the location of his coal yard, other inducements being "lower freight, better service, prompt attention, and an annual pass was sent to father every year without saying a word. The railroad company furnished the foundation wall and put in the track. Everything was all put in free in that direction. That was the same track that is there now"; that another draft of the contract upon which the defendant relied had been presented to him which he had refused to sign. "Finally this one was presented, which I did sign. The station agent of the New York, New Haven, and Hartford Railroad Company at Stoughton brought the contract to me. Before I signed it I think the agent came two or three times, and he threatened me with taking out my switch and throwing me out of business. I signed it under protest."

The plaintiff contended that he had a right, gained by prescription, to the use of the track of the defendant, and therefore that there was no consideration for the contract; and also that the contract was procured to be signed by duress exerted upon the plaintiff by the defendant's agent.

The presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

E. F. Leonard, for the plaintiff.

J. L. Hall, for the defendant, was not called upon.

HAMMOND, J. These exceptions relate only to the seventh count. It is agreed that the verdict for the defendant on that

count was rightly ordered if the contract of July 28, 1897, between the parties was valid.

This contract is attacked upon the grounds of want of consideration, and of duress. Upon neither ground can the attack succeed. The defendant was under no obligation, either as a common carrier or by reason of any previous contracts, to continue either the maintenance or operation of the tracks in question, and its undertaking to continue such maintenance and operation was ample consideration for the undertakings on the part of the plaintiff. The defendant, having the right to discontinue the maintenance and operation, had the right to inform the plaintiff that unless he conformed to its terms it would be obliged to do so. The action of the defendant's station agent, even if correctly stated by the plaintiff, which the defendant does not admit, falls far short of duress.

Exceptions overruled.

DANIEL L. BARRY & another vs. ISAAC F. WOODBURY.

Suffolk. March 4, 1910. — May 18, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Contract, Consideration, Performance and breach. Practice, Civil, Rulings and instructions. Pleading, Civil, Declaration.

At the trial of an action of contract there was evidence which tended to show that the defendant sold to the plaintiff a certain boiler and engine which were fixtures in a factory building then owned by the defendant, that while the plaintiff, within a reasonable time after the sale, was removing the fixtures from the building, the defendant asked him to leave them there, as it would help him to dispose of the real estate, and that the defendant promised the plaintiff that, if the plaintiff would do so, he would pay the plaintiff for the boiler and engine when he sold the real estate, that the plaintiff granted the defendant's request, and left the fixtures in the factory. *Held*, that by the sale the plaintiff was given a license to enter upon the land of the defendant, sever the fixtures and carry them away as his property, and that his relinquishment of that right constituted a sufficient consideration for the promise of the defendant to pay for the fixtures when he sold the premises.

At the trial of an action upon an agreement of the defendant to pay to the plaintiff, when the defendant should sell certain real estate, the value of certain fixtures attached thereto, which the defendant had sold to the plaintiff a year before but

which at the defendant's request the plaintiff had left on the premises to help the defendant to sell the real estate, it appeared that the defendant refused to pay the plaintiff the value of the fixtures, and a material question was whether the defendant had sold the real estate, so that the payment was due to the plaintiff. It appeared that, at the time of the sale of the fixtures by the defendant to the plaintiff, the defendant had owned the real estate subject only to a mortgage given by a corporation, which had been a prior owner, to secure bonds issued by it, that shortly after the sale of the fixtures to the plaintiff the real estate had been conveyed by a tax deed, pursuant to a tax sale previously made, to a third person, and that a year later there had been another tax sale and deed to the same person, that about a year after the time when the agreement was made the defendant became the owner of all the bonds to secure which the mortgage on the real estate had been given by the corporation, and that about three months later he procured a discharge of that mortgage and the holder of the tax titles delivered a release and the defendant gave a quitclaim deed to another person. The defendant testified as to this transaction that he thought that "he did receive something from somebody for a release of his interest in that property." *Held*, that there was evidence from which findings, that the defendant had sold the real estate and that therefore payment for the fixtures was due to the plaintiff from the defendant, were warranted.

One, who owned certain real estate subject to a mortgage given by a corporation which had been a prior owner to secure the payment of certain of its bonds, agreed to sell certain fixtures attached thereto. Before the purchaser of the fixtures removed them, the real estate was sold by the collector of taxes of the town where it was situated for the collection of taxes of the previous year. About a year after the sale of the fixtures and after the tax sale, but within a reasonable time, as the plaintiff was removing the fixtures the defendant asked him to leave them on the real estate so as to help a sale of it, and, in consideration of a promise of the defendant to pay for the fixtures when he sold the real estate, the plaintiff granted the request. After having sold the real estate, the defendant refused to pay the plaintiff for the fixtures, contending that there was no consideration for his promise, since by the sale of the fixtures without the assent of the mortgagee the plaintiff received nothing which he could relinquish, and since the title to the fixtures passed with the title to the land at the tax sale, and so, at the time of the defendant's promise, the plaintiff had no right to remove the fixtures. It appeared that about a year after the making of the agreement the defendant had become the owner of all of the bonds which were secured by the mortgage, and that at the time of the sale of the real estate by the defendant the mortgage at his request had been discharged and the tax title had been released. There was no evidence that any one on behalf of the mortgagee or of the owner of the tax title objected to the plaintiff's removing the fixtures. *Held*, that the mere existence of the mortgage and of the tax deed under the circumstances did not make the relinquishment by the plaintiff of what right he had to remove the fixtures under his contract with the defendant an insufficient consideration for the promise of the defendant to pay for the fixtures.

Where no question of pleading is expressly raised at a trial and the presiding judge rules that on all the evidence the action cannot be maintained and orders a verdict for the defendant, such ruling of itself raises no question of pleading, and if the case, which there is evidence to support, is substantially although imperfectly stated in the declaration, the sustaining of an exception by the plaintiff to the ruling of the judge will not be prevented by the imperfections in the declaration.

CONTRACT OR TORT, with a declaration, as amended, in four counts. Writ dated March 21, 1906.

The first count of the declaration was for the conversion, among other things, of an engine and a boiler.

The second count alleged that on or about October 23, 1902, the defendant and the plaintiff entered into a contract "by the terms of which the defendant agreed that, if the plaintiff would let certain property of the plaintiff . . . [the engine and boiler in question] . . . remain in the Watertown Rubber Factory so called and be sold by the defendant with said factory, the defendant would within a reasonable time after such sale pay to the plaintiff a reasonable sum for said property of the plaintiff," that the plaintiff did as requested and the defendant sold the factory with the property of the plaintiff, that a reasonable time had elapsed since the sale, that the plaintiff had made demand upon the defendant, but that the defendant refused and neglected to pay to the plaintiff a reasonable sum for the property.

The third count alleged that the plaintiffs were induced to allow the boiler and engine, which were in the nature of fixtures and were attached to the realty, to remain in the factory by fraudulent concealment on the part of the defendant of the fact that the property "had been or was about to be sold for unpaid taxes," that it was so sold, that the purchaser took possession thereof, and that thereby the plaintiffs lost the right to remove the property.

The fourth count was as follows: "The plaintiffs say that on or about October 23, 1902, they bought of the defendant the right to detach and carry away as their own personal property certain fixtures attached to real estate in Watertown aforesaid. . . . And the defendant after said purchase requested the plaintiffs not at once to detach or remove said fixtures, but to leave them upon the premises for the time being or until he had an opportunity to sell said real estate and promised the plaintiffs that if they complied with said request he would pay them a fair and reasonable price for said fixtures. And the plaintiffs thereupon did comply with said request and left said fixtures attached to said real estate. And the defendant thereafterwards permitted said real estate including said fixtures to be sold for unpaid taxes, neglected to exercise his right of redemption from said

sale, but on the contrary released and conveyed to the holder of said tax title his right of redemption, whereby the purchaser of said tax title, one H. C. Grant, became the owner of said fixtures. Wherefore the plaintiffs say the defendant owes them an amount equal to the fair value of said fixtures."

The case was tried before *Bond, J.*

The plaintiff Barry testified in substance that as a result of a conversation with the defendant the latter sold to him on October 23, 1902, certain machinery in the Watertown Rubber Factory described in a four page schedule which he handed to Barry at the same time that he gave him the following receipt: "Oct. 23rd 1902. Received from M. Norton & Co. (\$3300.00) three thousand three hundred dollars being balance of amount due for machinery (in the Watertown rubber factory) owned by me. I. F. Woodbury." The boiler and engine which were the subject of this action were described in the schedule. Barry also testified that the defendant said to him that the schedule was an inventory of the property the defendant owned in the Watertown Rubber Factory; that the plaintiffs started to take out the machinery, and that the defendant told them that they need not be in any hurry, so that they took their time, and that in October, 1903, they had most of it removed; that at that time the witness and an assistant were at the factory taking down the brickwork from a boiler (not the one in suit) when the defendant expostulated, and that, upon the witness's showing himself, the defendant said "Now you leave that other boiler and engine [which were the ones concerning which the action was brought] and it will help me better to dispose of the real estate, and when I sell it, why, I will pay you for it." The witness assented to the proposition and the boiler and engine were left in the factory. The boiler was built into the brickwork on the outside of the main building with a wooden shed over it. The engine was on a foundation of granite piers and was bolted down to them. The boiler and the engine were connected.

It appeared that on October 6, 1902, the premises to which the boiler and engine were affixed were sold by the collector of taxes of the town of Watertown at a sale for the unpaid taxes of 1901 to one Rogers and that Rogers was given a deed dated October 24, 1902, which was recorded on the next day; that

Rogers likewise purchased the premises at a sale for the collection of the taxes of 1902 and received a deed dated October 18, 1905.

It also appeared that on October 23, 1902, the premises to which the boiler and engine were affixed were subject to a mortgage which had been executed by the Indurated Fibre Company, a prior owner, to secure certain bonds of the company, and that, within a few months before January 28, 1905, the defendant became the owner of all of those bonds. On January 21, 1905, he wrote to the mortgagee demanding a discharge of the mortgage, stating in his letter that he was the "owner of the equity in the real estate." On the same day Rogers executed releases of his tax deeds to one Harry C. Grant. On January 31, 1905, the mortgagee discharged the mortgage and the defendant conveyed the premises to Grant. The defendant testified as to these transactions that he thought that "he did receive something from somebody for a release of his interest in that property; that he presumed that some one in his behalf made an arrangement with Rogers, the first holder of the tax title before he released to Grant; that he presumed there were arrangements made that were authorized by him (Woodbury), possibly for the purpose of protecting his rights in that property."

At the close of the evidence, the presiding judge ruled that on all the evidence the plaintiffs could not recover, and ordered a verdict for the defendant; and the plaintiffs alleged exceptions.

J. E. Hannigan, for the plaintiffs.

V. J. Loring, (*J. H. McDonough* with him,) for the defendant.

HAMMOND, J. There was evidence of an agreement between the plaintiffs and the defendant, by the terms of which the latter contracted to sell to the former certain machinery, including the boiler and engine in question, then in a factory of the defendant, and that the plaintiffs paid the defendant the full contract price therefor and took the receipt of October 23, 1902. The machinery was to be regarded, when severed, as personal property. Under such a contract the plaintiffs were licensed to enter upon the land, sever the articles covered by the contract and carry them away as their own property. *Clafin v. Carpenter*, 4 Met. 580. *Douglas v. Shumway*, 18 Gray, 498. In

the absence of any specified time for the removal of the articles the rule is that they must be removed within a reasonable time; and under the circumstances of this case it was a question for the jury whether that time had expired at the time of the conversation alleged to have taken place between Barry and the defendant in October, 1903; as was also the question whether that conversation ever took place.

If both of these questions are answered in favor of the plaintiffs, then there was a promise on the part of the defendant to pay to the plaintiffs a sum of money equal to the value of the boiler and engine upon a certain contingency; and the promise was upon a sufficient consideration, namely, the relinquishment of the right given to the plaintiffs by the contract to enter upon the premises and sever and carry away the boiler and engine as their own property. It might have been further found that the sale by the defendant to Grant was a sale within the meaning of the contract and consequently that in the absence of some other ground of defense the defendant became answerable to the plaintiffs for the reasonable price of the boiler and engine.

It is said that the defendant could not have given the right to sever the fixtures without the consent of the mortgagee. Be it so. It does not appear that the mortgagee ever made any objection, although the work of removal had been going on from time to time for about a year; and there is nothing to show that it ever would have made any objection. Indeed in view of these facts, taken in connection with the relation sustained by the defendant to the indebtedness secured by the mortgage deed, it might well be found that the mortgagee as such had but little interest in the matter as against that of the defendant, and was willing that the articles should be removed.

The fact that the property had been sold for taxes was not conclusive against the maintenance of the action. The defendant had not been disturbed in his possession. The plaintiffs were engaged in removing the articles in the exercise of a right claimed by them, and, so far as they knew, their claim was just and legal at least as against the defendant with whom alone they were dealing. The owner of the tax title did not attempt to interfere in the matter so far as appears by the record, and there is nothing to show that he cared anything about it.

Upon the whole it seems clear that upon the facts not in dispute and those legitimately inferable from the evidence, the question whether the defendant was answerable to the plaintiffs for the value of the engine and the boiler is a question of fact to be determined by the jury under proper instructions.

The defendant further urges that even if the question is one of fact the plaintiffs have failed to state the case properly, or in other words that the case proved is not the case alleged in any of the counts. But no question of pleading was expressly raised at the trial; and where the general nature of the case stated in the pleadings is seen and the trouble is simply that it is imperfectly stated, a general ruling that upon the evidence the action cannot be maintained raises of itself no question of pleading. As was said by Holmes, J., in *Tangney v. Sullivan*, 163 Mass. 166, "The ruling asked dealt with the evidence, not with the pleadings." See also *McLean v. Richardson*, 127 Mass. 339; *Batchelder v. Batchelder*, 2 Allen, 105; *Carpenter v. Fisher*, 175 Mass. 9. The case of which there was evidence as above outlined was substantially within the "four quarters" of the fourth count, although there imperfectly stated.

Exceptions sustained.

WILLIAM M. VERMILYE vs. POSTAL TELEGRAPH CABLE
COMPANY OF MASSACHUSETTS.

Suffolk. March 4, 1910. — May 18, 1910.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Telegraph Company, Liability for refusal to transmit message. Words, "Willful."

A telegraph company is engaged in a quasi public employment, to be carried on for the accommodation of the community with a view to the general benefit, and has no right to refuse to receive a proper message for whose transmission payment is tendered.

The rule stated in *Wheelock v. Postal Telegraph Cable Co.* 197 Mass. 119, is that the damages to be recovered for a breach of contract in transmitting a telegraphic message are such as reasonably might have been expected to be within the contemplation of the sender and of the telegraph company by reason of the contents of the message or of the circumstances attending the transaction when the contract for its transmission was made. For his protection under this rule, one

desiring to send a business telegraphic message from Boston to New York pasted thereon, in a position where its presence had no tendency to confuse the telegraph operator and did not increase the probability of error or delay in the transmission of the message, a small sticker containing the following: "Notice is hereby given that this is a business message, and that failure to deliver it promptly and correctly is likely to cause the sender financial loss. Further particulars will be furnished if desired on application to the sender at" an address given. The message and the sticker were upon an ordinary blank furnished by the company, on the back of which were printed certain "terms and conditions," among which it was stipulated, "It is agreed between the sender of the message written on the face hereof and the . . . company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, beyond the amount received for sending the same." An extra charge would be made for sending a repeated message. The sender tendered to the company the message with the sticker thereon and with the fee for the sending of it unrepeatd. The company refused absolutely to transmit the message while it was accompanied with the notice. *Held*, that the absolute refusal of the defendant to receive and send the message was unreasonable, and that the company was liable either at common law or under R. L. c. 122, §§ 9, 11, for damages resulting from such refusal.

A telegraph company, which intentionally and unreasonably refuses to transmit, for one proffering it for transmission together with the usual fee therefor, a message which has affixed thereto by means of a sticker a notice informing the company as to the nature of the message and its importance to the sender from a financial point of view in order that the nature and particulars of the undertaking of the company may be understood by it, renders itself liable to pay to the sender of the message the penalty provided by R. L. c. 122, §§ 9, 10, for a wilful refusal to transmit a message faithfully and impartially, such intentional and unreasonable refusal being wilful and within the meaning of the statute.

TORT, with a declaration in three counts, the first count being at common law for damages resulting from the refusal of the defendant to transmit a telegraphic message for the plaintiff, and the second count being under R. L. c. 122, §§ 9, 11, for the same cause of action. The third count was for recovery of the penalty prescribed by R. L. c. 122, § 10, for the wilful neglect and refusal of a telegraph company to comply with the requirements of § 9. Writ dated May 8, 1908.

The case was heard by *Schofield, J.*, without a jury. He made findings and rulings substantially as follows:

The plaintiff is the Boston agent of A. G. Hyde and Sons, a New York corporation engaged in the conversion of textile fabric. On April 7, 1908, he presented at the Essex Street office of the defendant in Boston, with the money necessary to pay the charges for its transmission as an unrepeatd message, the following telegraphic message for transmission to his principal:

"Apr. 7, 1908.

"A. G. Hyde & Sons,
361 Broadway,
New York, N. Y.

"Express Purbeck four pieces Sakana Shade one fifty-six.

"William M. Vermilye."

The message was written on a blank form furnished by the defendant.* On the blank, which was of yellow paper, in the indented space opposite the three lines containing the name and address of A. G. Hyde and Sons, the plaintiff had pasted a small sticker about three fourths of an inch in width and two inches in length, of white paper, on which was printed in small type, in blue ink, enclosed in a well-defined rectangular ruled line or border, the notice set out in the opinion. The message was a genuine business message. The person to whom the message was presented at the defendant's office refused to receive it, but informed the plaintiff that if he took the sticker off he would send the telegram. Nothing was said in regard to repeating the message or transmitting it at the rates charged for a repeated or an insured message. The plaintiff was told, "We do not accept

* On the back of this blank, under the words "Terms and Conditions," was included the following:

"To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the message written on the face hereof and the Postal Telegraph-Cable Company, that said Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other Company when necessary to reach its destination.

"Correctness in the transmission of messages to any point on the lines of the Company can be INSURED by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz: one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance."

these messages with the stickers on." The plaintiff suffered no pecuniary loss by reason of the refusal of the defendant to receive the message. He suffered the inconvenience involved in transmitting the message by some other channel, mail or telephone.

There was no rule or regulation of the defendant in existence previous to the presentation of this telegram, forbidding the pasting of a sticker like the one in question upon a telegraph blank with a message for transmission. The clerk who refused to receive this telegram acted in pursuance of instructions then recently received at the Essex Street office from the Boston manager of the defendant's business. The evidence shows that the plaintiff had on several previous occasions presented messages with similar stickers fastened upon them. The subject of accepting such messages had been under consideration by the Boston management of the defendant for some days. It was a new question, and resulted in an order which was first made known to the plaintiff when he presented the message in this case. There was no evidence that any person other than the plaintiff ever presented a message with a similar sticker and notice attached.

The plaintiff had often used blank forms of the defendant to send messages, and was familiar with the stipulations printed upon the back of them, including the provisions in respect to repeating and insuring and the cost thereof. His object in placing the sticker on this telegram was to put himself in a position to recover actual damages suffered by mis-transmission, or non-delivery, in excess of charges, under the rules then recently declared in *Wheelock v. Postal Telegraph Cable Co.* 197 Mass. 119. He was acting in good faith for the protection of his business interests and under legal advice.

"In respect to the form of the message as presented, F. Scott Smith, manager of the defendant's office at 96 Essex Street, testified . . . on cross-examination, 'In this case the sticker is placed after the address, and an operator in sending it might get confused.' . . . Upon careful consideration of the evidence in regard to confusing the operator, the court finds as a fact that the mere presence of the sticker and notice on the blank had no such tendency, and that they did not increase the probability of error or delay in transmitting the message. If further particulars were sought, as directed by the notice, delay would result, of course.

"There was evidence that the plaintiff at other times after April 7 tendered messages to the defendant for transmission, accompanied by a notice similar to that which is printed on the sticker used in this case. The notice was attached in different ways, and on one occasion was read to the defendant's clerk. . . . Upon all the material evidence the court finds as a fact that the sole ground of the refusal was that the message had attached to it the sticker containing the notice. The refusal to transmit the message with sticker attached was absolute, and broad enough to include a refusal if the rates for a repeated message or an insured message had been tendered.

"There was evidence tending to show the relations existing between the defendant and the Western Union Telegraph Company in reference to the conduct of their business. The court rules that all the evidence upon that subject admitted at the trial is competent and material, as having some tendency to show whether the action of the defendant in refusing to receive the message was reasonable or arbitrary. Upon all the material evidence upon this point the court finds that in the transmission of messages by electricity for the public between Boston and New York the Western Union Company and the defendant are the only companies engaged in the business and that there is practically no competition between them. Their rates are the same. The rates were recently changed at the same time, and to the same amount. The companies work in harmony with each other, and the conditions printed on the back of the telegraph forms furnished to the public by each are practically identical. All persons presenting messages for transmission are required to use these forms."

The trial judge found for the plaintiff in the sum of one dollar under each of the first two counts of the declaration, but required him to elect between the first and second counts before entry of judgment; under the third count, he found for the plaintiff in the sum of \$50. The defendant alleged exceptions.

G. P. Wardner & A. Lord, for the defendant.

O. O. Partridge, (*S. F. Batchelder* with him,) for the plaintiff.

KNOWLTON, C. J. The plaintiff, having occasion to use the telegraph frequently in his business, and desiring to give a notice that would entitle him to recover special damages suf-

ferred from a neglect of the defendant to transmit promptly and correctly a message which he took to its office to be sent, put upon the blank on which the message was written a gum "sticker," on which a notice was printed as follows: "Notice is hereby given that this is a business message, and that failure to deliver it promptly and correctly is likely to cause the sender financial loss. Further particulars will be furnished if desired on application to the sender at 116 Bedford St., Boston." This he did for his protection under the rule stated in *Wheelock v. Postal Telegraph Cable Co.* 197 Mass. 119, and *Squire v. Western Union Telegraph Co.* 98 Mass. 232, 236, 237, that the damages to be recovered for a breach of contract in transmitting a telegraphic message are such as reasonably might have been expected to be within the contemplation of the parties, by reason of the contents of the message or the circumstances attending the transaction when the contract was made. At different times other messages, accompanied by similar notices in different forms, were offered by the plaintiff to the defendant for transmission and refused, and one or more of this kind was sent. Seemingly, both parties were trying to do that which was thought best for the protection of their respective rights and interests in reference to the liabilities growing out of this kind of contract. The findings of the judge who tried the case without a jury have relieved the controversy of some of the questions which otherwise might arise. He found that there was an absolute refusal of the defendant to receive and transmit the message while it was accompanied by such a notice. Nothing was said by either party about having the message repeated or insured, as it might have been under the regulations of the company upon payment of an additional price. He found that this refusal was without reference to the particular form in which the notice was presented, and that the form chosen by the plaintiff for the notice on this message had no tendency to confuse the operator, and did not increase the probability of error or delay in transmitting the message. These findings were well supported by the evidence.

The first count was at common law for a refusal to receive and forward the message, and the second was under the R. L. c. 122, §§ 9, 11, for the same cause of action. The defendant was engaged in a *quasi* public employment, to be carried on for the accommo-

dation of the community, with a view to the general benefit. It had no right to refuse to receive a proper message, for whose transmission payment was tendered. R. L. c. 122, § 9. *Ellis v. American Telegraph Co.* 13 Allen, 226, 231. The only question raised is whether the giving of the notice by the plaintiff relieved the defendant of its obligation to transmit the message. It was certainly the right of the plaintiff to inform the defendant as to the nature of the message, and its importance from a financial point of view, in order that the nature and particulars of its undertaking might be understood by the defendant, and the obligation that it incurred in reference to damages for a breach of the contract. *Wheelock v. Postal Telegraph Cable Co.*, *ubi supra*. Such a notice would furnish no justification for a refusal to send a message, whether it might or might not be a sufficient reason for charging something more than the lowest rate established for the transmission of messages. See *Bernard v. Adams Express Co.*, *ante*, 254. It was intended to show that the damage for a failure properly to send and deliver the message would probably be substantial, and, under the statute and the rules and regulations of the company, to create a liability that might reach the sum of \$100. Such a liability might exist without a special notice if the language of the message sufficiently indicated the importance of a prompt delivery of it, and the loss that would result from a failure to deliver it promptly. Whatever negotiations or proposals or limitations on the part of the defendant might have been warranted by the giving of the notice, the absolute refusal to receive and send the message was unreasonable, and justified a finding for the plaintiff under the first or second count, either under the statute or at common law.

The other count was under the R. L. c. 122, §§ 9, 10, to recover the forfeiture provided by § 10. The question under this count is whether the refusal of the defendant was wilful, within the meaning of the section. It is conceded that it was intentional, and the judge found that it was unreasonable. He ruled that a refusal that was both intentional and unreasonable was wilful, within the meaning of the statute. This ruling was right.

The defendant's argument upon this branch of the case is chiefly in the nature of an assumption that the conduct of the

defendant was reasonable, in reference to the different rates charged, depending upon whether the message was sent in the usual way or was repeated or insured, and in reference to the attempt to impose upon the defendant by the notice a liability that otherwise would not exist. This argument is answered by the findings of the judge that the refusal of the defendant was absolute, and without reference to the rates that might be charged in view of the different degrees of responsibility that might be assumed for a failure to transmit the message correctly and promptly.

We have already said that these findings were well warranted by the evidence.

Exceptions overruled.

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ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADVERSE POSSESSION.

Where mortgage deed purported to convey to mortgagee fee in land, but estate which mortgagor had to convey was only remainder after life estate of his father and after conveyance he continued to live on estate with father for more than twenty years after mortgage note matured, such sharing possession with father was not adverse possession as to mortgagee, see MORTGAGE, 5.

AGENCY.

Existence of Relation.

1. Where a stable keeper lets for an afternoon a hack with a pair of horses and the driver to another stable keeper, who sends the hack with its driver to a funeral in charge of an undertaker, who sits on the front seat of the hearse at the head of the funeral procession and directs its course and speed, the hack driver remains the servant of the first stable keeper who pays him and who sent him out for the afternoon, and, if a person attempting in the exercise of due care to cross the path of the funeral with a horse and buggy is injured by reason of the negligence of the hack driver, such employer is liable in damages. *Hussey v. Franey*, 413.

Scope of Authority.

2. In an action to recover the amount of a sum of money which was entrusted by the plaintiff to an employee of the defendant, who professed to receive it as the agent of the defendant for transmission to a foreign country, where the case of the plaintiff depends on his showing that the employee of the defendant to whom he entrusted the money was acting within the scope of his apparent authority as agent of the defendant, evidence of the history of the transaction, including the receipt in writing for the money given to the plaintiff by the employee whose apparent authority is in question, and evidence tending to show that such employee was undertaking to act as agent of the defendant and not on his own account, including his

Agency (continued).

card which he gave to the plaintiff at the defendant's office with the name and address of the defendant upon it below his own name, are pertinent and competent. So also evidence, that such employee made use of the defendant's letter book to copy letters written by him in regard to a previous transaction with another person in which he had undertaken to act for the defendant, properly may be admitted as bearing, although slightly, on the scope of the apparent authority of the employee and on the defendant's means of knowledge in regard to such apparent authority. *Rintamäki v. Cunard Steamship Co.* 115.

3. In an action by a native of Finland against an ocean steamship company for a sum of money entrusted to an employee of the defendant for transmission to a person in Finland, it appeared that the employee of the defendant to whom the money was entrusted appropriated it to his own use and shortly afterwards disappeared. The plaintiff had been in this country about ten years and could not read, write or speak English. The employee of the defendant to whom the plaintiff entrusted the money also was a Fin, and the plaintiff had known him for about four years, having met him first at the defendant's office, when the plaintiff went there with a friend who had business with the defendant. At the time of entrusting the money the plaintiff went into a basement office at the defendant's principal place of business in this Commonwealth, where the defendant's name was displayed and where also was a notice that foreign money orders were for sale. Inside the office was a counter behind which were five persons, all at desks, one of whom was the Finnish employee. The plaintiff addressed himself to this employee, and explained to him that he wished to send the sum of money to a certain person in Finland. The employee undertook in behalf of the defendant to send the money for the plaintiff and said, "In between six and seven weeks, if the money should not reach Finland, you could come here in this office and get your money back." Thereupon the plaintiff told the employee where to send the money and counted it out to him, and the employee gave the plaintiff a receipt for the money on a memorandum form of the defendant signed in his own name. The business was conducted openly before the other persons present. There was evidence that the Finnish employee, with the approval of a person who was or represented himself to be the defendant's agent, previously had acted for the defendant in forwarding to a person in Finland tickets from Finland to America and that his letters in this transaction were copied in the letter books in the defendant's office, also that an advertisement in Finnish had been inserted by the defendant in a newspaper in another city which referred to the employee in question in connection with the defendant's passenger business from Finland as "Manager of the Finnish department." The head of the department in which this man was employed testified on cross-examination that the defendant sometimes sent tickets to Finland for Finnish customers, and that if a Finnish customer came in, the business, whether relating to the sale of tickets or drafts, ordinarily would be turned over to the defendant's Finnish representative and that he himself would not appear in it at all. Held, that as between the plaintiff and the defendant the actual authority of the em-

ployee to whom the plaintiff entrusted the money was immaterial, if the defendant suffered him to exercise an authority which he did not in fact possess or negligently failed to prevent him from doing so and the plaintiff thereby was led to deal with him as with one having the authority which he purported to have; and that there was evidence warranting a finding that the defendant's employee in receiving the plaintiff's money was acting within the scope of his apparent authority as agent of the defendant and that the plaintiff was justified in dealing with him accordingly. *Rintamaki v. Cunard Steamship Co.* 115.

Lack of authority of "subordinate agent" of insurance company to bind company by agreeing to have certain policy changed to cover property described therein when it was removed from one building to another, see INSURANCE, 3.

Scope of Employment.

4. In an action by a workman employed in a foundry against his employer, for personal injuries sustained by reason of one of his hands being caught and crushed between a car about which he was working and the door of an oven, it appeared that the plaintiff worked in a part of the defendant's foundry called the core room, where there were six or eight ovens side by side used for the baking of cores, that the cores were made of sand mixed with flour and other substances and were shaped to go inside of moulds so that in making hollow castings the molten metal might be poured in between the mould and the core, that the cores were mixed and put in shape in a part of the core room which was at a considerable distance from the ovens, that when this had been done they were carried by the workmen to the place where the ovens were, and were placed by the workmen upon cars, and that when the cars were loaded they were run into the ovens, where the cores received the necessary baking, that on the day of the accident a core broke while it was being carried from the moulding department to the pasting department, and that the superintendent of the core room said to the plaintiff, "there is a main core for a steam cylinder coming back, that broke in rolling off, and I want you to get it pasted as quick as you can and into the oven for the day's heat." It was undisputed that from the nature of the break and the temperature of the core great care would be necessary to adjust and keep the parts together until it could be placed on the car and run into the oven, where the heat would cause the parts to fuse and adhere firmly. The accident occurred while the plaintiff was obeying this order, and the defendant contended, that it was not liable, because the plaintiff in undertaking to run the car into the oven was a mere volunteer and was not acting within the scope of his employment. Held, that the acts of the plaintiff in accompanying the core to the oven were necessary for its safe carriage, and were within the scope of the order, which it was his duty to obey. *Ruddy v. George F. Blake Manuf. Co.* 172.

Undisclosed.

Finding, on conflicting evidence, of existence of contract was held to be warranted where jury properly might have found that dealings between plaintiff and defendant's husband were on behalf of defendant, although

Agency (*continued*).

defendant's husband had told plaintiff he was acting for himself and plaintiff had believed him, see *CONTRACT*, 1.

Double Employment.

Evidence, in actions by real estate brokers for commissions for procuring tenant or purchaser of certain premises, which was held not as matter of law necessarily to mean that agent had accepted employment by both prospective tenant or purchaser and owner, see *post*, 9, 10.

Agent's Duty to Principal.

5. A broker, who undertakes to procure a loan for an owner of land which is subject to a mortgage either by the giving of a new mortgage or by a pledge and assignment of the existing mortgage as security, if he honestly and continuously tries to obtain such a loan and is unsuccessful, is not precluded from buying the mortgaged property in good faith in his own behalf at a sale in foreclosure of the mortgage and procuring a new mortgage on it for his own benefit, his employment as a broker, which created a fiduciary relation between him and the owner of the land, having been terminated without fault on his part when it became too late to prevent the foreclosure sale. *Clark v. Delano*, 224.

Liability of Principal to Agent.

Broker's commission.

6. Where an owner of real estate employs a broker to procure for him a purchaser on certain terms, and the broker secures a customer who is both willing and able financially to purchase the property on such terms, and the principal is informed of that fact, the broker's commission is earned, even if a sale never is completed either because the parties never enter into a binding agreement or because the owner refuses or neglects to make a conveyance. *Goodnough v. Kinney*, 203.
7. A real estate broker, who is employed by a landowner merely to procure a tenant for certain premises, becomes entitled to a commission if he procures a customer who is able, willing and ready to become a tenant of the property upon the terms fixed by the owner and the owner accepts the customer as a tenant, and if the owner afterwards refuses to give a lease or otherwise to carry out the transaction, this does not affect the broker's right to his commission. *Cohen v. Ames*, 186.
8. In an action by a real estate broker to recover a commission for procuring a tenant for certain premises of the defendant, there was evidence on which it could have been found that the plaintiff was employed by the defendant to see a certain person and bring him to the defendant and that it was agreed that, if the defendant accepted this person as a tenant when brought to him by the plaintiff, the plaintiff should be paid the ordinary broker's commission, that the person was so brought by the plaintiff and was accepted by the defendant as a tenant, who began to make out a lease to him which the proposed tenant was ready to accept and comply with, but that, objection being made to the proposed tenant by other tenants in the de-

defendant's building, the defendant refused to give him any lease or to let him into the building. *Held*, that the plaintiff was entitled to go to the jury. *Cohen v. Ames*, 186.

9. At the trial before a judge without a jury of an action for a commission alleged to have been earned by the plaintiff in acting as broker in procuring a purchaser for real estate of the defendant, although an attorney at law, who had been employed in the transaction by a purchaser whom the plaintiff had testified that he had procured, remarks in testifying that he informed the defendant that the plaintiff was the broker for his client, the judge need not find that the plaintiff was employed by both parties and therefore could recover commission from neither, especially where there is much other evidence tending to show that the plaintiff was not employed by the purchaser. *Goodnough v. Kinney*, 203.
10. In an action by a real estate broker to recover a commission for procuring a tenant for certain premises of the defendant, where the plaintiff introduces evidence tending to prove that the defendant employed him to procure such a tenant and that the plaintiff brought to the defendant a person who was able, willing and ready to become a tenant of the premises on the defendant's terms, and that the defendant agreed to accept this person as a tenant but afterwards refused to give him a lease, if the person thus alleged to have been procured by the plaintiff as a tenant testifies that, when the premises in question were occupied by another tenant, he told the plaintiff that he would give him \$500 if he would secure a lease of the premises for him, this is not a sufficient ground for ordering a verdict for the defendant, because the jury may not believe the testimony, or may find that there was merely a promise or an offer of a promise which never was accepted by the plaintiff, so that at most the question whether there was a double employment which would prevent the plaintiff from recovering is one of fact for the jury. *Cohen v. Ames*, 186.

In tort.

For personal injuries received while at work within scope of employment, see *ante*, 4; NEGLIGENCE, 1-27; PLEADING, CIVIL, 1; EVIDENCE, 6, 8, 9.

APPEAL.

1. Where jurisdiction is given to a court or magistrate by a statute, and there is no provision for an appeal, the decision of the court or magistrate is final. *Renado v. Lummus*, 155.
- Handing to clerk of Superior Court at his home after office hours of papers for perfecting of appeal from Land Court to Superior Court did not perfect appeal, see CLERK OF COURTS, 1; LAND COURT, 4.
- From refusal of assessors to abate tax, see TAX, 4, 5.
- In suits in equity, see EQUITY PLEADING AND PRACTICE, 2, 4, 5; EQUITY JURISDICTION, 14; MORTGAGE, 6.
- In proceedings in Land Court, see LAND COURT, 1, 2-8.

ASSESSMENT.

City is not liable in tort to person compelled to pay tax which is excessive by reason of fraudulent assessment, see PUBLIC OFFICERS, 2.

Assessment upon members of incorporated social club, which under by-laws was invalid because voted for by less than majority of executive committee, see CORPORATION, 1.

ASSESSORS OF TAXES.

City is not liable in tort to person compelled to pay tax which is excessive by reason of assessment fraudulently made by its assessors, see PUBLIC OFFICERS, 2.

ASSIGNMENT.

1. If a salesman, whose employment has been terminated by his employer before the expiration of the term for which he was employed, and who, instead of treating the contract as broken and suing for damages for the breach, notifies his employer that he regards the contract as still in force and holds himself in readiness to work under it, makes, before the term of the contract has expired, an assignment in writing of all claim which he then has or may thereafter have against his employer for sums due him for services and commissions as salesman "whether such claim for services and commissions have accrued, or may hereafter accrue under the written agreement" made by him with his employer or under any oral renewal thereof, this is not an assignment of a claim for damages for a breach of the contract, but is an assignment of all sums then due to him or which may thereafter become due to him for services and commissions under his contract with his employer, and is valid in assigning future compensation to become due under an existing contract. *Allen v. Chicago Pneumatic Tool Co.* 569.
2. In the absence of fraud and where both parties act in good faith, an individual contractor may make a lawful contract to furnish materials to a city under a name which purports to be that of a corporation and may make a lawful assignment in writing of the money which he is to receive under the contract, signing it in such corporate name by a certain person as president, although there is no corporation of that name and the only connection with the contract of the person named as president is that of a foreman employed by the contractor. *William Gilligan Co. v. Casey*, 26.
3. The money to be received under a contract to furnish a city with sand, gravel and crushed stone is not "future earnings" within the meaning of St. 1905, c. 308, nor "future wages" within the meaning of St. 1906, c. 390. *Ibid.*
4. If a person, who holds an assignment in writing of the price to be received by a contractor under a contract to furnish a city with certain materials, causes the assignment to be recorded in the office of the city clerk of the

city where the assignor resides, this has no effect upon the construction of the assignment and cannot convert it into an assignment of "future earnings" within the meaning of St. 1905, c. 308, which requires such a recording to make an assignment of future earnings valid against a trustee process. *William Gilligan Co. v. Casey*, 26.

ATTACHMENT.

Of Mortgaged Personal Property.

1. In an action brought by a mortgagee of personal property against an officer who had attached the property under R. L. c. 167, §§ 69, 70, for its alleged conversion, it appeared that, on the day after the attachment, the plaintiff in attempting to make a demand in writing under § 70 had delivered to the defendant a notice which did not apply to the goods under attachment and stated an amount which was not a just and true account of the amount due under the mortgage, and that, on the twenty-ninth day after the attachment, the plaintiff had given the defendant a demand in writing stating a just and true account of the debt for which the property was liable to him, which the defendant contended was not given in time. There was evidence upon which the jury might have found that the plaintiff when he gave the first notice supposed that it was good, that the errors were made inadvertently and with no intention to mislead, that as soon as the plaintiff became aware that the notice was bad he took measures to give a second notice and that this was given with reasonable promptness after the plaintiff discovered the mistakes in the first notice, that the delay on the part of the plaintiff was with no intent to injure or prejudice the defendant in any way and was due entirely to inadvertence, and that no rights had intervened between the time of the attachment and the time of the second notice. There also was evidence of the plaintiff from which the jury might have found further that it was from the first the determination of the attaching creditor, under whose directions the defendant was acting in making the attachment, to hold the property "anyhow" whether there was any mortgage on it or not, and to take his chances of being compelled to pay the mortgage debt, that the value of the property was less than the amount of the mortgage and from this and other circumstances it might have been inferred that the delay was in no way prejudicial to the defendant and that he had done nothing which he would not have done if the notice had been given sooner. *Held*, that it could not have been ruled as matter of law that the notice was not given in time, and also that a verdict for the plaintiff was warranted. *Congress Investment Co. v. Reid*, 576.

Of Mortgaged Real Estate.

Right of creditor attaching real estate subject to mortgage, as to surplus after mortgage sale, see EQUITABLE JURISDICTION, 10.

Dissolution.

Dissolution of attachment by failure to levy on execution within thirty days after judgment, see EXECUTION, 1.

AUTOMOBILE.

1. Review by HAMMOND, J., of statutes regarding the operation of automobiles in this Commonwealth. *Commonwealth v. Newhall*, 344.
2. A statute, which relates only to the regulation of the operation of motor vehicles in this Commonwealth, contains a provision, "No ordinance, by-law or regulation now in force in any city or town or in any park or parkway which regulates the speed at which motor vehicles shall run upon its ways, or which excludes such vehicles therefrom or which governs or restricts the use of such vehicles shall hereafter have any force or effect." Previous to the enactment of the statute, an elaborate code of regulations had been adopted by the street commissioners of the city of Boston under the authority of an act of the Legislature which made no reference to motor vehicles. If the statute were held to have made of no effect the regulations of the street commissioners, the result would be to allow to those operating motor vehicles the use of the streets of Boston without observance of the code and thus to impair and probably eventually substantially to destroy the efficiency of the code. *Held*, that before the statute could be given such effect, the intent of the Legislature therefor must be shown plainly by the language of the statute interpreted in the light of the circumstances at the time it was passed and of the history of the legislation of which it formed a part. *Ibid*.
3. In St. 1909, c. 534, relating to the operation of motor vehicles, that part of § 17, which provides that "No ordinance, by-law or regulation now in force in any city or town or in any park or parkway which regulates the speed at which motor vehicles shall be run upon its ways or which excludes such vehicles therefrom or which governs or restricts the use of such vehicles shall hereafter have any force or effect," was intended by the Legislature to refer only to those regulations which theretofore had been made under St. 1903, c. 473, and St. 1905, c. 366, referring to the same subject, and was not intended to refer to or to affect a code of "street traffic regulations and rules for driving" which previously had been established by the street commissioners of the city of Boston as to all vehicles on its public streets under the authority given to them by St. 1908, c. 447, to "pass ordinances, by-laws or regulations relative to street traffic, or to the movement, stopping or standing of vehicles," and "to pass, and to amend or change from time to time, all regulations for such purpose, not inconsistent with law, which they shall deem needful to prevent the congestion and delay of traffic, and for other purposes"; and therefore those of such rules which are not inconsistent with the statute remain in force as to motor vehicles as well as to other vehicles therein described. *Ibid*.
4. Under St. 1903, c. 473, § 1, as amended by St. 1905, c. 311, § 2, and St. 1906, c. 112, § 8, the registration of an automobile expires upon a transfer of ownership, and an automobile, which after such a transfer bears the number of its former registration and no other, cannot be lawfully upon a highway. *Feeley v. Melrose*, 329.

5. Under R. L. c. 208, § 55, which provides that "whoever . . . with intent to cheat or defraud the owner thereof . . . refuses to pay for the use of a horse or carriage the lawful hack or carriage fare established therefor by any city or town, shall be punished" as therein provided, a complaint cannot be maintained for refusing to pay the lawful fare for the use of an automobile. *Commonwealth v. Goldman*, 400.

Proof, at trial of complaint for operating automobile at excessive rate of speed, of fact of excessive speed by means of photo-speed-recorder, see EVIDENCE, 10, 14, 15.

Actions against city by owner of and persons riding in automobile who were injured by automobile running into open trench, at trial of which were applied principles that, if negligence of driver contributed to injury, or if automobile was on highway in violation of automobile registration laws, there could be no recovery, see WAY, 3-5.

BANKRUPTCY.

1. Under § 70 a (5) of the bankruptcy act of 1898, which provides that the trustee of the estate of a bankrupt shall be vested with the title of the bankrupt to all property which "he could by any means have transferred," the interest of the bankrupt under a will in a fund of which his father, who is living, enjoys the income, and a share of which will pass to the bankrupt in case he survives his father but not otherwise, vests in the trustee. *Clarke v. Fay*, 228.

Since national bankruptcy act does not apply to insolvent incorporated social clubs, receivership proceedings may be maintained in equity court of Commonwealth with regard thereto, see EQUITY JURISDICTION, 18.

Where trustee or fiduciary has mixed funds of beneficiaries with his own funds and then is adjudged bankrupt, beneficiaries may follow funds, or may prove in bankruptcy with general creditors, but cannot do both, see TRUST, 4.

BICYCLE.

Action against town for personal injuries received by one who rode on bicycle into barrier negligently left in highway by employees of town, see WAY, 1, 2; NEGLIGENCE, 57.

BILLS AND NOTES.

Consideration.

1. In an action by the payee of a promissory note against an indorser of the note in blank before delivery the defendant may show that there was no consideration for his indorsement, and that, so far as the payee and himself are concerned, the note was an accommodation note. *Nesson v. Milen*, 515.
2. In an action against the indorser before delivery of a promissory note secured by a mortgage on land, for the balance due on the note after the

mortgage had been foreclosed under a power of sale and the proceeds of the sale had proved to be insufficient to pay the note in full, the defendant should be allowed to show that before the note was given the plaintiff agreed in writing to sell to the defendant the land on which the mortgage was foreclosed and agreed to convey the land to him subject to a mortgage of \$10,000, but that the plaintiff was unable to carry out this agreement because there was a mortgage on the land to a bank for \$5,000 which he was unable to get discharged, that the plaintiff thereupon proposed that the defendant should take a deed, through a third person as a conduit, free and clear of all incumbrances and should cause a mortgage and a mortgage note indorsed by the defendant to be given to the plaintiff by the third person, so as to enable the plaintiff to raise money, the plaintiff agreeing to discharge the mortgage to the bank as soon as he could and not to look to the defendant for payment by reason of his indorsement on the mortgage note, the plaintiff representing to the defendant that the defendant's indorsement of the mortgage note would be for the plaintiff's accommodation, that the transaction thus proposed was carried out, and that the mortgage note sued upon was given by the third person acting as a conduit and was indorsed by the defendant pursuant to the arrangement stated, the defendant thus receiving no consideration for his indorsement and the plaintiff suffering no detriment. *Nesson v. Millen*, 515.

3. In an action by the payee of a promissory note against an indorser of the note before delivery, where the defendant shows that his indorsement of the note was without consideration and for the accommodation of the plaintiff, if it appears that the defendant made certain payments of interest on the note which he was not bound to make, this does not estop or preclude him from setting up the want of consideration as a defense. *Ibid*.

Rights of Holder in Due Course.

4. Under R. L. c. 73, §§ 69-74, one who purchases a foreign bill of exchange for cash before maturity and without notice of any infirmity is a holder in due course, and in an action on the bill against the acceptor by one having the rights of such a holder, the defense that the drawer of the bill secured its acceptance by fraud or misrepresentation is not open to the defendant; nor in such an action is the bill subject to a counter claim or set-off against the drawer. *De Reiset v. Loughery*, 86.

Payment.

5. The presumption that a witnessed promissory note has been paid when it has been due for more than twenty years is a presumption of fact which can be rebutted by any legal evidence showing that the note has not been paid. *Jenkins v. Andover Theological Seminary*, 376.

Defense of Fraud.

Fact that acceptance of foreign bill of exchange was procured by fraud or misrepresentation is no defense against holder in due course, see *ante*, 4.

BOND.

Damages in action on replevin bond, see **REPLEVIN**, 1-5.

BOSTON.

Statutes regarding use of motor vehicles which were construed so as not to abrogate, with regard to automobiles, rules of street commissioners of Boston which had been adopted under authority of previous statute, see **AUTOMOBILE**, 2, 3.

BROKER.

Actions by real estate broker for commission, see **AGENCY**, 6-10.

Evidence which was held not to make it necessary for judges, hearing actions by real estate brokers for their commissions, to find that brokers had accepted employment for both prospective purchaser or tenant and prospective seller or landlord, see **AGENCY**, 9, 10.

Broker employed to procure loan for owner of land subject to mortgage, after unsuccessful attempt so to do, may purchase at sale in foreclosure of mortgage, and does not become constructive trustee by so doing, see **AGENCY**, 5.

BURIAL LOT.

Suit in equity to enforce rights of plaintiffs in burial lot, which they and their brother, defendant, had purchased and which, without fraud, was conveyed to defendant individually, was defeated because of lack of memorandum such as is required by R. L. c. 74, § 1, cl. 4; c. 147, § 1, see **TRUST**, 1; **EQUITY PLEADING AND PRACTICE**, 8.

CAMBRIDGE.

1. In the provision of the revised charter of the city of Cambridge, contained in St. 1891, c. 864, § 20, as amended by St. 1907, c. 491, that in the year 1908, and every third year thereafter, in the month of April the city council shall elect a solicitor for the city of Cambridge, the mention of the month in which the election shall be held is merely directory, and, upon a petition for a writ of mandamus contesting the validity of the election of a city solicitor by the city council of that city, it was conceded that the first election after the amendment of 1907 could take place lawfully on June 29, 1909. *Pevey v. Aylward*, 102.
2. A provision contained in the Joint Rules and Orders of the City Council of the city of Cambridge that every ordinance and every order requiring concurrent action shall, after passing one board, remain in the possession of the clerk of that board for thirty-six hours, to give an opportunity for a motion for reconsideration, has no application to the election of a city solicitor by a concurrent vote of the city council of that city taken orally

Cambridge (*continued*).

as required by R. L. c. 26, § 7, such a proceeding not being an ordinance or an order. *Pevey v. Aylward*, 102.

3. A rule of the common council of a city providing that "in the absence of the president, the clerk, and in his absence, the senior member present, shall call the council to order, and preside until a president *pro tempore* is chosen by ballot," applies only to the organization of a meeting in the absence of the president, and has no application where, after a meeting has been organized and has been doing business, the president abandons his post, leaving the meeting without a presiding officer. In such a case the meeting properly may choose a presiding officer in any reasonable way. *Ibid.*

4. Section 20 of St. 1891, c. 364, of the revised charter of the city of Cambridge, as amended by St. 1907, c. 491, provides that at the times there directed the city council shall by concurrent vote, the board of aldermen acting first, elect a solicitor for the city. The board of aldermen acting under this statute voted to elect a certain person city solicitor and sent a communication to the common council giving notice of the election. On the receipt of this communication, a member of the common council moved to adjourn. The president declared that this motion was carried, "and immediately left the chair." The vote on the motion was doubted. A member of the council at once assumed the chair, and upon the motion of another member was chosen president *pro tempore*. A committee which was appointed to wait on the president and request him to resume his duties reported that they were unable to find the president. The communication from the board of aldermen giving notice of their election of a city solicitor then was read by the president *pro tempore*, and the council upon motion proceeded to the election of a city solicitor, the roll being called and the vote taken *viva voce* as required by R. L. c. 26, § 7. A majority of the members present, who also were a majority of all the members of the common council, voted for the same person elected by the board of aldermen, the person voted for was declared to have been elected city solicitor, and notice to this effect was sent to the board of aldermen. A rule of the common council was as follows: "The president shall declare all votes. If any member doubts the vote, the president, without further debate upon the question, shall require the members voting in the affirmative and negative to rise and stand until they are counted." Upon a petition for a writ of mandamus contesting the validity of the election of the city solicitor, it was *held*, that upon the election of a temporary presiding officer, it became his duty to resolve the doubt on the motion to adjourn, and that, although in doing this the temporary president and the council did not follow the rule, yet, by proceeding to do business apparently by common consent and without objection from anybody, they resolved the doubt in regard to the vote on the motion to adjourn, their action being inconsistent with any other conclusion than that the motion was not carried; that this action, appearing to have been taken by the unanimous consent of all the members present and its meaning being plain, was as effectual as if it had been regular; and that the president's declaration before leaving the chair that the motion to adjourn was carried became of

no effect when the vote was doubted without delay; therefore, that the election of the city solicitor was valid. *Pevey v. Aylward*, 102.

CARRIER.

Of Passengers.

1. In order that an action may be maintained against a carrier by a passenger who was injured while attempting to avoid what at the time appeared to the passenger to be imminent peril, it is sufficient to show that, with a reasonable anticipation of bodily injury as the situation then appeared, the passenger acted on the urgency of the moment and was hurt, although afterwards it may be plain that all danger might have been avoided by mere inaction on his part. *Steverman v. Boston Elevated Railway*, 508.
Evidence, tending to show that person riding on front platform of street railway car knew of rule that one did so at his own risk, was held to have been excluded rightly as immaterial in action against street railway company for such person's death, since he was passenger at any rate, and whether or not he was in exercise of due care did not affect statutory liability of defendant, see NEGLIGENCE, 45, 46.
Actions by passengers, and by persons attempting to become such, for injuries or death alleged to have resulted from negligence of street railway companies and elevated railway company, or from gross negligence of their servants or agents, see NEGLIGENCE, 33-55.

Of Goods.

2. In an action against a common carrier of goods engaged in carrying on an interstate express business, for the loss of a package of hides of the value of about \$150, which were delivered to the defendant for transportation from the plaintiff's tannery in the State of New Jersey to the plaintiff at his shop in Massachusetts, it appeared that the package was lost and that its loss was unexplained, that the contract of carriage contained in the receipt accepted by the plaintiff contained the following provision: "In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars unless a greater value is stated herein and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated therein." It further appeared that the package was delivered by the plaintiff to the defendant without any statement of its value or of its contents, although the agent of the defendant asked whether any value was to be declared, that the methods and precautions used by the defendant for carrying and delivering the package safely were based upon the plaintiff's agreement that its value did not exceed \$50, and that, if the value of the package had been given, an additional charge would have been made for transportation and additional precautions would have been taken against loss. Section 20 of 24 U. S. Sts. at Large, c. 104,

Carrier (*continued*).

called the interstate commerce act, as amended by 84 U. S. Sta. at Large, c. 3591, § 7, provides as follows: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." The defendant admitted its liability for \$50 and paid the money into court, and the only question was whether the plaintiff could recover for the value of the package in excess of that sum. *Held*, that the agreement of the parties, contained in the receipt accepted by the plaintiff, as to the value of the package in the absence of a declaration, was not a contract or receipt exempting a common carrier from liability within the meaning of the provision of the interstate commerce act above quoted, and, being a contract deliberately entered into by both parties in good faith, was binding upon both, so that the plaintiff could recover nothing in excess of the sum of \$50. *Bernard v. Adams Express Co.* 254.

Provisions of interstate commerce act do not apply to agreement contained in contract above mentioned, see INTERSTATE COMMERCE ACT, 1.

Various questions determined and considered as to whether liquor dealer or his servant, in transporting into "no license" city intoxicating liquors which dealer had sold in "license" city, was violating laws as to sale and transportation of intoxicating liquors, see INTOXICATING LIQUORS, 3, 4.

CEMETERY.

Suit in equity against brother of plaintiffs seeking establishment of alleged right of plaintiffs in cemetery lot purchased by plaintiffs and defendant as family burial lot and conveyed to defendant individually, see TRUST, 1; EQUITY PLEADING AND PRACTICE, 8.

CERTIORARI.

1. In a petition for a writ of certiorari to correct alleged errors of law in proceedings before the board of railroad commissioners, the clerk of that board, whose duties are defined by St. 1906, c. 463, Part I. § 1, should not be joined as a respondent, the records which it is his duty to keep being subject to the control of the commissioners so far as is essential to the proper administration of justice in the proceedings before them. *Weston v. Railroad Commissioners*, 94.
2. Upon a petition for a writ of certiorari to correct alleged errors of law in proceedings before the board of railroad commissioners, the only facts

outside the original record which can be considered by the court are those set up in the official answers of the commissioners. *Weston v. Railroad Commissioners*, 94.

8. Whether a writ of certiorari is the proper remedy to correct errors of law made by the board of railroad commissioners upon an application under St. 1906, c. 516, § 5, by the directors named in a written agreement of association for the formation of an electric railroad company for a certificate that public convenience and necessity require the construction of a railroad as proposed in such agreement, or whether the proper remedy would be in equity, here was not considered, because it was held that the commissioners had made no error. *Ibid.*

Grounds for petition for such writ and reasons why commissioners above referred to had made no error, see RAILROAD COMMISSIONERS, 1.

CHARITY.

Fund left in trust for use in founding charitable school in foreign country, where no corporation had been formed before testator's death, is not exempt from tax on inheritances, see TAX, 2.

Corporation conducting sanitarium, which was held to be owning and occupying its real estate for charitable purposes although but small part of its patients were free, and which therefore was exempt from taxation, see TAX, 3.

CIDER.

Questions which arose at trial of complaint for selling cider not at wholesale, see INTOXICATING LIQUORS, 1, 2.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CLERK OF COURTS.

1. The only place for making a record or for keeping a record of a case in the Superior Court is in the clerk's office, except as such records may be made or kept for the time being in a place where the court is sitting. *Old Colony Street Railway v. Thomas*, 529.

Application of foregoing principle in determining that papers to perfect appeal from Land Court, given to clerk of Superior Court at his home, did not perfect appeal, see LAND COURT, 4.

CLOUD ON TITLE.

Removal, by suit in equity under R. L. c. 182, § 15, for discharge of mortgage, of cloud on title caused by mortgage which has remained undischarged for more than twenty years after time for performance of conditions, see MORTGAGE, 2-6.

COMMONWEALTH.

Liability of Commonwealth for alleged breaches of agreements and of covenants of warranty and against incumbrances in deed by harbor and land commissioners of portions of Commonwealth Flats, caused by order made by city of Boston before deed for construction of sewer, see **HARBOR AND LAND COMMISSIONERS**, 1; **DEED**, 2, 3; **CONTRACT**, 12; **STATUTE**, 1.

Whether, under R. L. c. 201, court had jurisdiction to entertain suit in equity against Commonwealth, regarding such breaches, see **CONTRACT**, 12.

COMMONWEALTH FLATS.

Liability of Commonwealth for alleged breaches of agreements and of covenants of warranty and against incumbrances in deed by harbor and land commissioners of portions of Commonwealth Flats, caused by order made by city of Boston before deed for construction of sewer, see **HARBOR AND LAND COMMISSIONERS**, 1; **DEED**, 2, 3; **CONTRACT**, 12; **STATUTE**, 1.

COMPROMISE.

Evidence of attempt of party to compromise claim on which action being tried is based is inadmissible, see **EVIDENCE**, 2.

CONDUCT OF TRIAL.

In actions at law, see **PRACTICE, CIVIL**, 1, 2, 6-8, 10, 12, 14, 15; **CONTRACT**, 14, 15; **EVIDENCE**, 3-5, 12; **NEGLIGENCE**, 19; **WITNESS**, 3.

Conduct of criminal trials, see **PRACTICE, CRIMINAL**, 1; **HOMICIDE**, 16-21.

CONFLICT OF LAWS.

Interpretation and effect of foreign will, see **DEVISE AND LEGACY**, 1; **WILL**, 5.

Land in this Commonwealth, undertaken to be devised by will of one, who died domiciled in another State, where will has been proved in that State only, may be treated as intestate property in this Commonwealth in suit to redeem it from tax sale, see **TAX**, 9.

Action of tort by employee against employer for injury received while plaintiff was at work in another State, where there were counts under statutes of this Commonwealth and at common law, and it was held that, in absence of evidence to contrary, common law of other State would be presumed to be same as that of our own, although such presumption would not arise as to statutory law of other State; and it also was held that there was case for jury on count at common law, see **EVIDENCE**, 13; **NEGLIGENCE**, 21.

CONSTABLE.

Action against constable in which defendant was held by his acts to have been trespasser *ab initio* on plaintiff's premises, see **TRESPASS**, 1.

CONSTITUTIONAL LAW.

Unconstitutionality of Part of Statute.

Whether unconstitutional section of St. 1892, c. 402, can be separated from § 4 of statute, so that § 4 could be constitutional, see STATUTE, 1.

Obligation of Contracts.

1. A statute which attempted to extend the time within which land could be redeemed from tax sales already made under R. L. c. 13, §§ 58, 75, would be unconstitutional as impairing the obligation of contracts. *Solis v. Williams*, 350.

Impairment of Obligation of Contracts.

Provision of R. L. c. 182, § 15, regarding discharge of mortgages under certain circumstances, constitutes statute of limitations, and is not unconstitutional as impairing obligation of contracts when applied to mortgages, time limited for performance of which expired more than twenty years before date when statute was enacted, see MORTGAGE, 2.

Right of Trial by Jury.

2. Where the title to real property is put in issue in a proceeding at law, a trial by jury is not a privilege to be granted in the sound discretion of the court, as it is in the case of a probate appeal or of issues in a suit in equity, but is a right guaranteed by the Constitution. *Weeks v. Brooks*, 458.

Application of foregoing principle to appeal to Superior Court from Land Court as to questions of fact, see LAND COURT, 8.

Police Power.

Constitutionality of R. L. c. 56, §§ 56, 57, as amended by St. 1908, c. 643, making it crime to sell or have in possession with intent to sell milk below certain standard, see MILK, 1.

CONSTRUCTION.

- Of assignments, see ASSIGNMENTS, 1-4.
- Of contracts, see CONTRACT, 11, 12.
- Of deed, see DEED, 1.
- Of trust, see EQUITY JURISDICTION, 11, 12.
- Of wills, see DEVISE AND LEGACY, 1, 2.
- Of certain words, see WORDS.

CONTRACT.

What constitutes.

1. At the trial of an action against a woman for the purchase price of stone alleged to have been furnished by the plaintiff for the building of a cellar

Contract (continued).

upon the defendant's land, there was evidence tending to show that the land upon which the cellar was being built was the defendant's, but that the plaintiff did not know that fact until the action was commenced, and that the defendant's husband had told him that he owned the land and that he would pay for the stone. The defendant's husband testified that he had told the defendant that he was building the house upon her land and "that she knew what was being done there in a general way and she objected to my building it." *Held*, that the jury might have disbelieved the testimony of the defendant's husband that the defendant objected to the building of the house, and that the facts warranted a finding that the husband was the wife's agent in procuring the stone for the cellar, and that the agreement with the plaintiff was made by her authority. *Reid v. Miller*, 80.

2. At the trial of an action upon an agreement of the defendant to pay to the plaintiff, when the defendant should sell certain real estate, the value of certain fixtures attached thereto, which the defendant had sold to the plaintiff a year before but which at the defendant's request the plaintiff had left on the premises to help the defendant to sell the real estate, it appeared that the defendant refused to pay the plaintiff the value of the fixtures, and a material question was whether the defendant had sold the real estate, so that the payment was due to the plaintiff. It appeared that, at the time of the sale of the fixtures by the defendant to the plaintiff, the defendant had owned the real estate subject only to a mortgage given by a corporation, which had been a prior owner, to secure bonds issued by it, that shortly after the sale of the fixtures to the plaintiff the real estate had been conveyed by a tax deed, pursuant to a tax sale previously made, to a third person, and that a year later there had been another tax sale and deed to the same person, that about a year after the time when the agreement was made the defendant became the owner of all the bonds to secure which the mortgage on the real estate had been given by the corporation, and that about three months later he procured a discharge of that mortgage and the holder of the tax titles delivered a release and the defendant gave a quitclaim deed to another person. The defendant testified as to this transaction that he thought that "he did receive something from somebody for a release of his interest in that property." *Held*, that there was evidence from which findings, that the defendant had sold the real estate and that therefore payment for the fixtures was due to the plaintiff from the defendant, were warranted. *Barry v. Woodbury*, 592.

Action by assignee of salesman against employer upon contract of employment, involving questions whether, under provision in contract that, if either party did not desire to renew it at end of one year, he should give other notice in writing thereof, there was evidence which would warrant finding that parties elected to renew contract, see *post*, 16.

Consideration.

8. While forbearance from litigating a claim, which is known to the person forbearing to be frivolous or vexatious, is not a good consideration for a promise for the reason that the promotion of such litigation would be or could be found to be either fraudulent or wanting in good faith, yet, short

of that, forbearance from litigation is a good consideration for a promise, and it is not necessary in an action upon a promise made for such consideration that it should appear that there was in fact a good cause of action or a fair and reasonable ground of success in the threatened litigation.

Mackin v. Dwyer, 472.

4. At the trial of an action by a sister against her brother to recover for breach of an agreement by the defendant alleged to have been made in consideration of forbearance on the part of the plaintiff from contesting the will of the father of the plaintiff and of the defendant, one issue was whether in making a threat to contest the will the plaintiff had acted in good faith, and there was evidence tending to show that she had so acted. The defendant asked the presiding judge to instruct the jury that "the plaintiff must have acted in good faith in threatening to contest the will or there is not sufficient consideration to support the promise," but no such instruction was given either in form or in substance, and the defendant alleged exceptions. *Held*, that the exceptions must be sustained, because the substance of the instruction asked for should have been given to the jury in some form. *Ibid*.
5. At the trial of an action of contract by a sister against her brother to recover a sum of money which the plaintiff alleged that the defendant promised to pay to her if she would not oppose the proof of the will of their father, there was evidence tending to prove the following facts: At his death the father left personal property amounting to about \$300, all of which it was necessary to expend for the payment of taxes, expenses of the last sickness, of the funeral and of the administration of the estate, and real estate worth \$7,800. The father's will nominated the defendant as executor, gave a legacy of \$1,000 each to the plaintiff and her sister, a legacy of \$500 to another son, and by specific devises all of the real estate to the defendant and to his son. Previous to the death of the father he had lived in a tenement, an upper floor of which was occupied by the defendant and his family. Some member of the defendant's family always was present when the plaintiff or others of the children and grandchildren called upon the father. A few months before the father's death he drew \$1,800 from a bank, which he used to pay off a mortgage on the premises specifically devised to the defendant's son. After the issuance of a citation upon a petition of the defendant for proof of the will, there was a family council at which the plaintiff expressed her dissatisfaction with the will and announced her intention of contesting it. The defendant thereupon promised to pay her the \$1,000 given her in the will as a legacy if she would refrain from any contest. The plaintiff did refrain, relying on the defendant's promise, and the will was proved without objection. *Held*, that it could not be ruled as matter of law that the plaintiff's threat to contest the will was frivolous or vexatious, or that the promise of the defendant was without consideration. *Ibid*.
6. At the trial of an action of contract there was evidence which tended to show that the defendant sold to the plaintiff a certain boiler and engine which were fixtures in a factory building then owned by the defendant, that while the plaintiff, within a reasonable time after the sale, was re-

Contract (*continued*).

moving the fixtures from the building, the defendant asked him to leave them there, as it would help him to dispose of the real estate, and that the defendant promised the plaintiff that, if the plaintiff would do so, he would pay the plaintiff for the boiler and engine when he sold the real estate, that the plaintiff granted the defendant's request, and left the fixtures in the factory. *Held*, that by the sale the plaintiff was given a license to enter upon the land of the defendant, sever the fixtures and carry them away as his property, and that his relinquishment of that right constituted a sufficient consideration for the promise of the defendant to pay for the fixtures when he sold the premises. *Barry v. Woodbury*, 592.

7. One, who owned certain real estate subject to a mortgage given by a corporation which had been a prior owner to secure the payment of certain of its bonds, agreed to sell certain fixtures attached thereto. Before the purchaser of the fixtures removed them, the real estate was sold by the collector of taxes of the town where it was situated for the collection of taxes of the previous year. About a year after the sale of the fixtures and after the tax sale, but within a reasonable time, as the plaintiff was removing the fixtures the defendant asked him to leave them on the real estate so as to help a sale of it, and, in consideration of a promise of the defendant to pay for the fixtures when he sold the real estate, the plaintiff granted the request. After having sold the real estate, the defendant refused to pay the plaintiff for the fixtures, contending that there was no consideration for his promise, since by the sale of the fixtures without the assent of the mortgagee the plaintiff received nothing which he could relinquish, and since the title to the fixtures passed with the title to the land at the tax sale, and so, at the time of the defendant's promise, the plaintiff had no right to remove the fixtures. It appeared that about a year after the making of the agreement the defendant had become the owner of all of the bonds which were secured by the mortgage, and that at the time of the sale of the real estate by the defendant the mortgage at his request had been discharged and the tax title had been released. There was no evidence that any one on behalf of the mortgagee or of the owner of the tax title objected to the plaintiff's removing the fixtures. *Held*, that the mere existence of the mortgage and of the tax deed under the circumstances did not make the relinquishment by the plaintiff of what right he had to remove the fixtures under his contract with the defendant an insufficient consideration for the promise of the defendant to pay for the fixtures. *Ibid*.

8. Where the owner of a coal business and his predecessor in title have enjoyed for about twenty-nine years the use of certain side tracks, maintained and operated for them by a certain railroad company and its predecessor and connecting with its main lines, but there has been no contract or agreement as to the duration of the privileges so enjoyed, and the railroad company threatens the coal dealer that it will take out his switch and throw him out of business unless he will sign a contract in writing providing that in consideration of the railroad company's continuing to maintain and operate such side tracks, the coal dealer will assume all risks to buildings owned by him by reason of fire communicated thereto by locomotives

of the company, and because of such threat the coal dealer signs the contract "under protest," such a contract is supported by a good consideration and is not invalid by reason of the threat of the company, and it therefore is a bar to an action by the coal dealer against the railroad company for damages resulting from the burning of coal sheds of the dealer caused by sparks communicated from a locomotive of the company. *Porter v. New York, New Haven, & Hartford Railroad*, 590.

Defense of no consideration in action by payee of mortgage note against indorser before delivery, see **BILLS AND NOTES**, 1-3.

Validity.

9. No contract involving the incurring of expense can be binding upon either a watch district, established under Gen. Sts. c. 23, § 8, now R. L. c. 31, §§ 8-19, or upon an improvement district, established under St. 1870, c. 332, now R. L. c. 25, § 44, or upon a fire district, established under Gen. Sts. c. 24, § 33, now R. L. c. 32, §§ 49-70, until some provision has been made, by vote at least, to raise and appropriate the money to meet the expense; and therefore, although such a district votes to employ a certain person at a stated salary as a watchman and police officer, and such person accepts the appointment and serves as such officer, he cannot recover for such services if at the time of the vote there was no money in the treasury of the district and no further vote making an appropriation for the officer's salary was passed. *Costello v. North Easton Village District*, 54.
 10. Where a sister is dissatisfied with the provisions of her father's will and in good faith threatens to contest its proof and allowance but, in consideration of a promise on the part of her brother, who desired the will to be proved, to pay to her the amount of a legacy which was given to her in the will, forbears from contesting the will, the validity of the contract thus made by the brother is not affected by the fact that both the sister and the brother were acting under a mistaken idea as to their respective legal rights and obligations, so long as the brother was fully acquainted with the facts and there was no fraud or misrepresentation. *Mackin v. Dwyer*, 472.
- Certain contract of conditional sale which was held to have been valid, see **SALE**, 1.
- Validity of contract in writing made with city by one who used name other than his own therefor, see **ASSIGNMENT**, 2.
- Whether less than majority of board of county commissioners can make valid contract for county, see **COUNTY COMMISSIONERS**, 3.
- Certain contracts of county commissioners with architect relative to plans for proposed county buildings, which under circumstances were held to be invalid, see **COUNTY COMMISSIONERS**, 4, 5.
- Contract of owner of coal business with railroad company, providing for use of company's side track by owner of coal business, who agreed that he would assume and hold company harmless from all damage caused to his buildings by fire from company's locomotives, which was held not to be invalid because procured by duress practised by company, see *ante*, 8.

Construction.

11. A manufacturer and dealer in shoe polishes, who maintained boot blacking stands with signs upon them in various parts of the country, after negotiations with a dealer in cards called "transfer signs," letters from which could be used in substitution for painted letters on signs for advertising, the negotiations relating in part to the question whether the transfer signs would stand exposure to all kinds of weather, gave to the dealer in cards an order by letter for four thousand sets, the letter stating, "It is understood and agreed that you are to send us not more than twenty-four sets as soon as ready, and after a thorough trial we find that they do not work satisfactorily this order is to be cancelled." Fourteen sets of cards were shipped at once, and other shipments were made amounting to four thousand sets, all billed as of a year after the fourteen sets were sent. The purchaser refused to accept the shipments. *Held*, that under the circumstances the term "satisfactorily" meant "satisfactorily to a reasonable man"; and that, if there had been a reasonable opportunity to test the cards and if the purchaser as a reasonable man acting in good faith should have accepted them, then he should pay for them. *Fechter v. Whittemore*, 6.
12. The board of harbor and land commissioners in a bond for a deed agreed on January 10, 1899, to execute and deliver to a certain person a "warranty deed or deeds" of a part of the Commonwealth Flats in South Boston bounded by Summer Street extension, E Street, Fargo Street and D Street. On January 17, 1899, with the approval of the Governor and Council, the board made with the prospective purchaser a supplemental agreement in which it was recited that the contract for the sale of the premises was "made with the expectation on their part that Fargo and E Streets will be forthwith constructed, paved, sewered and sidewalks laid without expense to the purchasers," and in which was the following language: "We agree to use our best efforts during our continuance as members of the board of harbor and land commissioners to have such work done at an early date, either by the city of Boston, by the Commonwealth, or otherwise, without expense to the purchasers." On November 26, 1901, the land was conveyed by the board on behalf of the Commonwealth to the purchaser by a deed containing covenants that the land was free from incumbrances, and of warranty. On December 16, 1901, the city of Boston ordered the construction of certain inlet and connecting sewers joining to a sewer previously constructed in E Street. On October 7, 1904, an assessment was made therefor to be paid in ten yearly payments. Upon the first assessment becoming due and the Commonwealth refusing to pay it, the purchaser by a bill in equity in the Superior Court sought to have it adjudged that the Commonwealth should pay the assessment, and to have the Commonwealth ordered to do so and also to pay all payments to become due in the future. *Held*, that, the order for the inlet and connecting sewers not having been made until after the delivery of the deed, the Commonwealth was under no obligation to pay the assessment by reason of the covenants therein; and that neither in the bond for

the deed nor in the agreement supplemental thereto was there any express agreement to pay the tax; and therefore that the suit could not be maintained, even if, under the provisions of R. L. c. 201, relating to suits against the Commonwealth, the court had jurisdiction to entertain it, which was not decided. *Cotting v. Commonwealth*, 528.

Implied.

In fact.

Action by assignee of salesman against employer upon contract of employment, involving questions whether, under provision in contract that, if either party did not desire to renew it at end of one year, he should give other notice in writing thereof, there was evidence at trial which would warrant finding that parties elected to renew contract, see *ante*, 16.

Performance and Breach.

13. If the conditions of a certain sale are that the purchaser is to have ample opportunity to test the goods and that he may refuse them and cancel the order in case after an adequate test they are not satisfactory to him as a reasonable man acting in good faith, a premature delivery of the goods by the vendor to the purchaser cannot operate to the prejudice of the vendor if, after having had an adequate opportunity to make such test, the purchaser, if he had acted in good faith and as a reasonable man, should have been satisfied with the goods. *Fechtele v. Whittemore*, 6.
14. At the trial of an action for the price of certain goods alleged to have been sold to the defendant by the plaintiff, the conditions of the sale being that the defendant was to have ample opportunity to test the goods and that he might refuse them and cancel the order in case after an adequate test they were not satisfactory to him as a reasonable man acting in good faith, the defendant asked the presiding judge to rule that the burden was on the plaintiff to show that certain samples sent worked satisfactorily after a thorough trial, or that the defendant waived the condition of the contract. The presiding judge refused to rule as requested, but, while in his charge to the jury he did not in terms say anything about the burden of proof, the jury must have understood from the language of the charge that the plaintiff could not recover unless he showed that the defendant had had sufficient time to test and examine the goods and that he ought to have been satisfied with them as a reasonable man. *Held*, that the defendant was not harmed by the refusal of his request. *Ibid*.
15. If at the time of a sale no agreement is made to the contrary, it is sufficient if the goods sold are ready at the vendor's place of business at the appointed time, and therefore at the trial of an action upon an account annexed for goods shipped to the defendant in response to an order in writing which read, "You can enter our order for" goods, part "to be sent when ready," and the rest "six months after the first shipment," a charge to the jury, that "ordinarily, unless there is some agreement to the contrary, a delivery to a common carrier is a delivery to the purchaser," was not strictly accurate. Exceptions thereto by the defendant

Contract (*continued*).

here were not sustained however, because the instruction did the defendant no harm, since, the order stipulating that the plaintiff should ship the goods to the defendant, a delivery to the carrier was tantamount to a delivery to the defendant. *Fechtel v. Whittemore*, 6.

Proper measure of damages for breach of contract to furnish to plaintiff certain quality of coal at certain time and place, see DAMAGES, 1.

Whether, under circumstances, payment had become due to one who, having purchased fixtures, refrains from removing them on promise of owner of real estate upon which they were to pay him therefor when owner sold real estate, see *ante*, 2.

What constitutes performance and breach of contract of sale of "transfer signs," where contract contained stipulation that it was to be cancelled by purchase, if "after a thorough trial we find that they do not work satisfactorily," see *ante*, 11.

Action by vendor for breach by purchaser of contract of sale in not paying certain notes, until payment of which sale was not to become absolute, was held under circumstances not to have been barred by fact that plaintiff did not first return notes, see SALE, 1.

Breach by vendor of one of two independent contracts between same persons for furnishing of goods of same kind and quality at different times, by furnishing goods of inferior grade and refusing to furnish goods of proper grade, does not justify purchaser in assuming that other contract will be broken, nor therefore in rescinding it, see *post*, 17.

Liability of Commonwealth for alleged breaches of agreements and of covenants of warranty and against incumbrances in deed by harbor and land commissioners of portions of Commonwealth Flats, caused by order made by city of Boston before deed for construction of sewer, see HARBOR AND LAND COMMISSIONERS, 1; DEED, 2, 3; CONTRACT, 12; STATUTE, 1.

Ratification.

County commissioners were held not to have power, under certain special statute, to ratify invalid contract which they had attempted to make before statute was enacted with architect as to plans for proposed county buildings, see COUNTY COMMISSIONERS, 5.

Renewal.

16. In an action for an amount alleged to be due to the plaintiff as compensation for services and commissions, under the alleged renewal of a contract in writing between the plaintiff and the defendant, it appeared that by the contract in writing the plaintiff was employed by the defendant as a salesman for one year at a yearly salary of \$2,100, and an additional compensation of at least \$1,400 as commissions for the year, with a provision that if either or both parties did not desire to renew the contract notice should be given thirty days before its termination, that the plaintiff worked under this contract for the year, that no notice of a desire not to renew it was given by either party, and that the plaintiff continued his work as before until eight months and a half of the second year had ex-

pired, when he was notified by the defendant that on account of financial conditions and the great decrease in business there would be a "discontinuance" of his employment on the next day, that thereupon letters passed between him and the defendant, the plaintiff insisting that his employment was in force until the expiration of the second year and the defendant insisting that the contract had terminated at the expiration of the first year, that the plaintiff notified the defendant that he held himself subject to the defendant's working orders, although he testified that he tried to obtain other employment. The trial judge, who heard the case without a jury, found for the plaintiff in a sum which was substantially the amount claimed by him. *Held*, that from the fact that no notice was given before the expiration of the first year the judge had a right to infer that there was a disposition to renew the contract, and that, from the additional fact that the plaintiff, without any other express arrangement either written or oral, continued to work as before with the full knowledge and approbation of the defendant, the judge properly could infer that it was the understanding of the parties that the contract was renewed; and that such renewal was a hiring of the plaintiff for a second year upon the terms of the contract in writing, with the same right in either party to give notice within thirty days of its expiration that there was no further desire for renewal. *Allen v. Chicago Pneumatic Tool Co.* 569.

Assignment.

Assignment by plaintiff before termination of second year of contract described *ante*, 16, of claim for damages for breach by defendant, see ASSIGNMENT, 1.

Rescission.

17. Where there are two independent contracts between the same persons for the furnishing of certain goods of the same kind and quality at different times, the fact that the seller has committed a breach of the first contract by furnishing goods inferior to those required by the contract and by failing upon demand to furnish goods of the kind and quality required, does not justify the buyer in assuming that the seller also will break his second contract for a further supply of like goods, and, although the buyer may be reasonably apprehensive of a like breach of the second contract, he has no right to rescind or repudiate the second contract before it has been broken by the seller. *Hanson & Parker v. Wittenberg*, 319.
18. In an action for an alleged breach of a contract to furnish a certain commodity at an agreed price, upon the question whether the contract sued upon had been rescinded, evidence of the acts and declarations of the parties and of circumstances which might have furnished a motive for their conduct is competent, and, if it appears that there had been an advance in the price of the commodity or that it could not be obtained easily in the market, this may tend to show that it was not for the interest of the seller to insist upon performance, so that his silence, after a proposal of a rescission of the contract had been made to him by the buyer,

Contract (*continued*).

until the time for performance had elapsed may justify a finding that he acquiesced in the proposal and that the contract was cancelled by mutual consent. *Hanson & Parker v. Wittenberg*, 319.

Suit in equity for rescission of purchase of shares of capital stock of corporation, in which plaintiff contended that promoter fraudulently had sold him shares of his own instead of shares of treasury stock of corporation, so that purchase money had gone to promoter instead of to corporation, and it was held that plaintiff was not barred by determination against him of previous suit, see EQUITY JURISDICTION, 2.

Made in Consideration of Forbearance from Litigation.

See *ante*, 3-5, 10; FRAUDS, STATUTE OF, 1.

Impairment of Obligation of Contract by Statute.

Statute, which attempted to extend time within which land could be redeemed from tax sales already made under R. L. c. 13, §§ 58, 75, would be unconstitutional as impairing obligation of contracts, see CONSTITUTIONAL LAW, 1.

Provision of R. L. c. 182, § 15, regarding discharge of mortgages under certain circumstances, constitutes statute of limitations, and is not unconstitutional as impairing obligation of contracts when applied to mortgages, time limited for performance of which expired more than twenty years before date when statute was enacted, see MORTGAGE, 2.

CONVERSION.

1. An action of tort in the nature of trover will lie for the conversion of money. *Morrin v. Manning*, 205.

CORPORATION.

Incorporated Social Club.

1. A by-law of a corporation, organized under R. L. c. 125 as a social club, provided that an assessment upon the members might be made by a majority of the executive committee. The executive committee consisted of twenty members, fifteen of whom were chosen specially and five of whom were members *ex-officiis* as officers of the club. A by-law, other than that authorizing the assessment, provided that five members of the executive committee should constitute a quorum. A vote imposing a special assessment on the members of the club was passed at a meeting of the executive committee when a quorum was present and was voted for by a majority of those present which was not a majority of the whole committee. *Held*, that the attempted assessment was invalid, the power to impose such an assessment being given to a majority of the whole committee and not to a majority of a quorum of five. *Rogers v. Boston Club*, 261.

Receivership proceedings were held to be maintainable against insolvent incorporated social club, see EQUITY JURISDICTION, 13.

Determination of certain questions therein, see EQUITY JURISDICTION, 14, 15.

Enforcement in this Commonwealth of Right of Stockholder of Foreign Corporation to inspect Books.

2. The right of a stockholder in a corporation to inspect its books and records for good reasons and under proper conditions, which was recognized and enforced by this court in *Varney v. Baker*, 194 Mass. 239, will be enforced in this Commonwealth against a corporation organized in another State, when its books and the officer having custody of them are here and it has a usual place of business in Massachusetts. *Andrews v. Mines Corporation*, 121.
3. A writ of mandamus is the proper remedy to enforce the right of a stockholder in a corporation to inspect its books and records for good reasons and under proper conditions. *Ibid.*
4. Where at the hearing upon a petition for a writ of mandamus against a corporation to enforce the plaintiff's right to inspect the books and records of the respondent for good reasons and under proper conditions, if the petitioner shows that he asked the president of the respondent and also its treasurer, who was the custodian of the books, to be allowed to inspect them, and that the books and records on one occasion were taken from the petitioner's possession by force after he had begun to examine them, it cannot be said as matter of law that the petitioner did not make a sufficient effort to obtain the books for examination before filing his petition. *Ibid.*

Right of Purchaser of Treasury Stock to have Amount paid therefor placed in Corporation Treasury.

5. One, who through an agent of a corporation has bought shares of the capital stock of the corporation which it has in its treasury, cannot be compelled without his knowledge and against his will to receive and retain stock that belongs to the agent personally, thus leaving himself and the corporation without the benefit for corporate use of the money, which the corporation would have received from him if its agent had done his duty. *Newhall v. Enterprise Mining Co.* 585.

Foreign.

Stockholder in foreign corporation which has its office, usual place of business and books and records in this Commonwealth, can enforce right to inspect books and records by petition for writ of mandamus, see *ante*, 2-4.

COUNTY COMMISSIONERS.

1. In employing an architect to draw plans for proposed county buildings or for proposed alterations in buildings already existing, county commissioners, although they are a local body whose duties relate principally to the affairs of the county, act as a board of statutory officers whose power

- to bind the county by contract depends upon the authority conferred by the Legislature. *Adams v. County of Essex*, 189.
2. Where the proper accommodation of the public demands that a county building should be improved and made more convenient by extensive alterations or that it should be enlarged by the erection of additions so that, when completed, substantially a new structure will be provided, it is the duty of the county commissioners before contracting for any expenditure to call the attention of the Legislature to the necessity and to ask for an appropriation; and if an appropriation is granted, the commissioners are limited, as to the amount which lawfully they can contract to expend, to the amount appropriated. *Ibid*.
 3. Whether county commissioners can contract for the county except by a majority vote at a meeting of the board, at which the members are present or of which they have received notice, and a record of which is kept according to R. L. c. 20, § 18, here was doubted but was not decided, a contract of the commissioners which was not so made being decided to be unauthorized for another reason. *Ibid*.
 4. Although by R. L. c. 20, § 27, county commissioners are permitted to make an oral contract without competitive bids when the amount involved does not exceed \$800, and by the second paragraph of § 24 they are empowered "to represent their county and to have . . . the management of its business and affairs in all cases not otherwise expressly provided for," such commissioners are not authorized to bind the county by contracts involving less than \$800, made with an architect for the drawing of plans showing proposed alterations in a registry of deeds building, and of plans showing a separate boiler house for county buildings, where no special appropriation therefor has been made or authorized by the General Court as provided by the first paragraph of § 24. *Ibid*.
 5. Where county commissioners have made a contract with an architect for the drawing of plans for a heating plant isolated from county buildings, which they did not have authority to make because no appropriation had been made or authorized by the General Court in accordance with R. L. c. 20, § 24, they are not given authority to ratify such contract by a subsequent special statute authorizing the erection and equipment of such heating plant, if such statute expressly delegates the authority to contract for plans to a special commission and not to the county commissioners. *Ibid*.
 6. It seems, that if county commissioners, who have been given authority by the General Court to take land and to prepare plans for the erection of a certain county building, and for that purpose have been given authority to expend a sum not exceeding \$50,000, after having procured the money and having placed it in the county treasury, without complying with the requirements of R. L. c. 20, § 27, as to giving notice for proposals in case of contracts for building, altering, furnishing or repairing public buildings which exceed \$800, employ a certain architect to draw plans for a building of the estimated cost of \$275,000 without stipulating any definite compensation therefor, and either the commissioners or the architect understand that the usual compensation for such plans would exceed \$800, and the

architect prepares the plans and a reasonable compensation for the work is \$9,625, the architect cannot recover therefor from the county, because such a contract would be made in violation of R. L. c. 20, § 27, and therefore by the provisions of that section "no payment thereon shall be made by the county." *Adams v. County of Essex*, 189.

7. If by a statute of the General Court county commissioners are authorized to spend \$50,000 for the acquirement of land for a county building and for the preparation of plans for the building, and by a subsequent statute of the General Court an additional amount is authorized to be used for the acquirement of land for the same purpose, but no mention is made of plans in the later statute, any plans contracted for must be paid for out of the original \$50,000, and no part of the additional sum authorized by the subsequent statute can be so used. *Ibid*.
8. County commissioners, who have been authorized by the General Court to acquire land for the erection of a county building and to prepare suitable plans for such building, for which purposes they were to expend a sum not exceeding \$50,000, having procured the money and placed it in the county treasury, made a valid contract with an architect for the furnishing of plans for a building of the estimated cost of \$275,000, and the architect furnished such plans. The reasonable value of his services in doing so was \$9,625. Thereafter the architect was paid \$2,000 on account in two payments and the commissioners used up all but \$20.35 of the remainder of the \$50,000 appropriation in payments for land taken. The architect brought an action against the county for the balance alleged to be due him. The judge who presided at the trial ordered a verdict for the plaintiff for \$20.35. *Held*, that the action of the trial judge was correct, because, while the commissioners should have paid the plaintiff first and then sought an additional appropriation for the purpose of paying for land taken, their negligence in not doing so and in permitting the fund in their hands to be reduced so that the plaintiff could not be paid therefrom did not make the county liable, since in so doing the commissioners were acting as public officers and not as the county's agents. *Ibid*.
9. At the trial of an action of contract a material question was whether or not certain payments, made by county commissioners out of funds which by a statute of the General Court they were authorized to use for the acquiring of land upon which a county building was to be built, were legal, and the county treasurer testified without contradiction that the sums so paid were included in accounts properly certified as having been allowed by the commissioners by an assistant clerk of courts, who by R. L. c. 165, § 3, was an assistant clerk of the board of county commissioners, and that the certificate was accompanied by deeds of conveyance of land for which the payments were made. The presiding judge was asked to rule as matter of law that the payments were illegal because they were not made, as required by R. L. c. 21, § 9, upon orders drawn and signed by a majority of the commissioners certified by their clerk and accompanied by the original bills, vouchers or evidences of county indebtedness for which the payment was ordered, stating in detail the items

and confirming the bill or account. The ruling was refused. *Held*, that the ruling was refused rightly because from the testimony of the treasurer a finding would have been warranted that the provisions of the statute had been complied with. *Adams v. County of Essex*, 189.

COVENANT.

See DEED, 2, 8; HARBOR AND LAND COMMISSIONERS, 1.

CUSTOM.

Whether answer of plaintiff, in cross-examination as to certain custom, to carefully prepared question, which gave to custom as to which he had testified in direct examination different aspect and one unfavorable to his contentions, should be adopted as true, was held to be question for jury, and judge was held to have been warranted in refusing to instruct jury on basis solely of such answer in cross-examination, see PRACTICE, CIVIL, 8.

DAMAGES.

In Actions of Contract.

1. In an action for a breach of a contract to ship certain coal to the plaintiff in barges sent by the plaintiff to receive it, in delivering coal of a kind and quality inferior to that called for by the contract, and for a later breach in failing to deliver coal of the required kind and quality, if it appears that the defendant, when he shipped the part of the coal which was shipped to the plaintiff, knew that it was not the kind of coal which the plaintiff had purchased and had insisted on having and also knew that until the arrival of the coal the plaintiff would be ignorant of the substitution, and if it also appears that the defendant fully understood that the port of shipment was merely a place for transportation to other markets, and that upon the receipt of the coal at its port of destination it was to be resold by the plaintiff, and if it is shown that by a usage of the trade known to the parties the buyer does not inspect the coal when shipped in his vessels but is expected to rely upon the seller's promise to deliver coal of the quality called for by the contract, it would be unfair to limit the plaintiff's damages to the difference between the contract price and the market price at the port of shipment, and the measure of damages must include not only the difference in price in the market at the plaintiff's place of business to which the coal was shipped and to be shipped, but also the expenses and the necessary disbursements incurred by the plaintiff by reason of the defendant's breach of contract. *Hanson & Parker v. Wittenberg*, 819.
2. In an action to recover damages for the alleged breach of an agreement in writing for the exchange of real estate, whereby, among other things, the defendant agreed to sell and the plaintiff, who was described as the party of the second part, agreed to buy "the new three family apartment house . . . shown to the party of the second part all completely finished and all rented, 84-86-84 dollars per month," it appeared that in making

the exchange under the contract this property at the request of the plaintiff was conveyed by the defendant to a third person, and that later, when the plaintiff sold the property, it was conveyed by this third person to the purchaser. It further appeared that when the property was conveyed by the defendant two of the three apartments in the house were vacant, that one of these apartments the plaintiff never was able to let, up to the time he sold the property about four months after its purchase, and that the other vacant apartment remained unlet for three months, after which by incurring expense in employing a broker the plaintiff succeeded in letting it. *Held*, that the measure of damages was the difference between the value of the property in the condition in which it was represented by the contract to be and its value in its actual condition at the time of the delivery of the deeds under the contract, and that the fact that the deed of this property was made to another person at the plaintiff's request instead of to the plaintiff was immaterial; that the plaintiff was entitled to recover substantial damages, and that, upon the question of the value of the house when partly occupied as compared with its value when wholly occupied, all reasonable probabilities as to the length of the period which would elapse before the house would be wholly occupied and the probable loss of rents during that period properly might be considered. *Held, also*, that evidence as to the difficulty of procuring tenants and as to the loss incurred by the plaintiff in failing to procure them under the circumstances of the case might furnish the best standard for measuring the difference in value between the property as it was agreed by the defendant that it should be and as it actually was, and therefore properly might be considered. *Page v. Johnston*, 274.

What damages may be recovered in action of contract by one to whom, after breach by employer of contract of employment, salesman before term of employment has yet terminated has assigned all his claim thereunder "whether such claim for services and commissions have accrued, or may hereafter accrue," see *ASSIGNMENT*, 1.

In action on replevin bond, see *REPLEVIN*, 1-5.

In Actions of Tort.

8. In this Commonwealth there is no difference between a husband and a wife as to the right to recover for loss of consortium, and where a husband as administrator of the estate of his wife has recovered damages in an action of tort against a corporation operating a street railway for personal injuries sustained by his wife while a passenger in a car of the defendant, in an action brought by him personally against the corporation for consequential damages arising from the same injuries to his wife, he can recover only for the expenses to which he was put in the care and attempted cure of his wife, and can recover nothing for loss of consortium. *Bolger v. Boston Elevated Railway*, 420.

Injury to side, caused by wrench received as passenger was jumping to avoid burst of flame from under seat of closed electric car, was held to be proper element of damage in action by passenger against street railway company, see *NEGLIGENCE*, 47-49.

In Suit in Equity to rescind Sale for Fraud.

4. Where, in a suit in equity to rescind a sale to the defendant by the plaintiff of shares of the capital stock of a corporation because the sale was procured by fraud on the part of the defendant, it appears that the sale should be rescinded, but that the defendant, because he had parted with the shares before the commencement of the suit, is unable to return them to the plaintiff, and the court of equity therefore retains jurisdiction of the case for the purpose of awarding to the plaintiff the damages which he suffered from the defendant's fraud, the amount of such damages is the difference between the value of the shares on the day when the sale was made and the amount paid by the defendant to the plaintiff for them, with interest at six per cent thereon from the date of the sale to the date of the final decree. *Whether* a different rule would apply and, if so, what rule, in a case where the defendant after the filing of the bill had disabled himself from returning the shares to the plaintiff, here was not considered. *Stewart v. Joyce*, 371.

In Action on Replevin Bond.

See REPLEVIN, 1-5.

DEATH.

Actions to recover for death, see NEGLIGENCE, 42-46, 50, 56.

DEED.

Construction.

1. One R., who was the owner of a mill pond and the surrounding land, all of which was subject to a mortgage, made a deed, to a purchaser named G., of his equity of redemption in a parcel of this land south and west of a part of the mill pond and bounded on the northerly and easterly sides by the edge of the pond. On the same day the mortgagee of all the land executed a deed of release to G. of the same parcel of land with the same description except that the northerly and easterly sides were described as bounded "by the mill pond belonging to R." Both of the deeds were acknowledged and recorded on the day of their execution and were recorded on consecutive pages of the same book in the registry of deeds. The description of the property in the deed of release from the mortgagee concluded with the words, "with all the privileges mentioned in a deed given by said R. to said G. this day and subject to all the restrictions and reservations therein mentioned." The restrictions and reservations in the deed of R. gave G. "the privilege of filling up the mill pond on the northerly and easterly sides of the aforementioned premises one rod in width from the lines above described." "The lands above described" were "the edge of my mill pond" and "the edge of said mill pond." Upon a petition in the Land Court for a registration of the title to a lot

of land covered by the mill pond which was acquired by the petitioner under a deed from the mortgagee named above, after his foreclosure of the mortgage upon the portions of the land not released from the mortgage, and which was confirmed by a deed from the assignee in bankruptcy of the estate of R., the respondent claimed title under G., and contended that the northerly and easterly boundary of his land was not the edge of the mill pond but was the thread of a certain stream on the other side of the land claimed by the petitioner, basing his contention on the ground that the partial release to G. of the mortgage mentioned above included the land claimed by the petitioner and the part of the pond which covered it. *Held*, that the two deeds to G. above described, although they were executed by different parties, could have been found to have constituted parts of one transaction and to have been made pursuant to a common understanding and arrangement on the part of all persons interested, that the privilege granted by the deed of R., the mortgagor, which was incorporated by reference in the release of the mortgage, was inconsistent with any other construction than that the boundary of the respondent's land was the edge of the mill pond, and that a finding for the petitioner was warranted. *Whitney v. Miller*, 448.

Covenants of Warranty and against Incumbrances.

2. In January, 1899, the board of harbor and land commissioners, acting under the authority conferred upon them by Pub. Sta. c. 19, § 3, made a contract in writing to sell and convey to a certain person a parcel of land included within the Commonwealth Flats. In November, 1899, the city of Boston ordered the construction of a main sewer in a street abutting on the premises agreed to be conveyed. In November, 1901, the land was conveyed pursuant to the agreement by the board of harbor and land commissioners acting on behalf of the Commonwealth, the deed containing covenants of warranty and that the land was free from incumbrances. On December 1, 1902, the city of Boston levied an assessment for the construction of the sewer, which the grantee in the deed was obliged to pay. *Held*, that, although the construction of the sewer and the assessment therefor were not made until after the deed was executed and delivered, the fact, that the order for the construction was made before the deed, created a liability which was sure to become absolute and enforceable against the land as soon as the work was completed and the expense ascertained and the Commonwealth had parted with its title, which liability constituted a breach of the covenant of freedom from incumbrances; and also, that under the covenant of warranty the Commonwealth was bound to relieve the grantee from the charge upon the land, and that its failure to do so was a breach of that covenant. *Cotting v. Commonwealth*, 528.
3. Section 4 of St. 1892, c. 402, which provides that when an assessment for the cost of a sewer in the city of Boston "is made for a parcel of land for which the owner is by law exempt from being taxed," the collection of the assessment shall be suspended, but "after the day on which the

Deed (*continued*).

parcel ceases to be owned by a person or corporation so exempt" the assessment "shall be collected as if that day were the date of the passage of the . . . order for making the sewer," does not apply until an assessment has been made; and therefore did not suspend the creation of an incumbrance created by an order of the city of Boston for the construction of a sewer on a portion of the Commonwealth Flats, which order was made while the portion of the flats in question was owned by the Commonwealth, nor cause the effect of the order not to be an incumbrance at the time of a conveyance made by the Commonwealth after the order for construction but before an assessment for the cost of the sewer was laid. *Cotting v. Commonwealth*, 253.

Power of harbor and land commissioners to make such covenants, see HARBOR AND LAND COMMISSIONERS, 1.

DEPOSITION.

Case where, in cross-examination of witness in taking of his deposition, long statement of third party which related to matters in controversy in, and contained opinion as to responsibility for personal injuries for which, action was brought by employee against employer, was read into record, and where judge presiding at trial of action was held not to have acted improperly in permitting such part of deposition to be read to jury, see WITNESS, 8.

DESCENT AND DISTRIBUTION.

Land in this Commonwealth, undertaken to be devised by will of one, who died domiciled in another State, where will has been proved in that State only, may be treated as intestate property in this Commonwealth in suit to redeem it from tax sale, see TAX, 9.

Inheritance tax, see TAX, 1, 2.

DEVISE AND LEGACY.

What Estate.

1. A testator by his will devised certain real estate in this Commonwealth to trustees with directions that his brother might have the use of it during his life, that after the death of the brother one third of the income therefrom should be paid to the brother's wife during her life "and the remaining two thirds . . . shall be divided among the children of my said brother, in the proportion of three eighths thereof to his son A., and five eighths thereof equally to his other children, then living during the lifetime of their mother; and immediately after the decease of" the brother and his wife "I direct that the said real estate . . . shall be vested in the children" of the brother "in the same proportions as above mentioned as to the income thereof. If any of the said children be then deceased, under lawful age and without issue, the surviving children . . . to take the share of said decedent in the same proportions but if either of the said

children be then deceased leaving lawful issue him or her surviving, such issue shall take and if more than one divide equally among them, the part or share his her or their deceased parent would have taken if then living." At the time of the testator's death, the brother and his wife and six of their children were living. One of the children died before the father and mother and before reaching the age of twenty-one, intestate and without issue. Another, F., after having been adjudged insolvent and after his property had passed to his assignee in insolvency under the laws of this Commonwealth, died without issue and of more than lawful age during the lifetime of his father and mother. The assignee in insolvency conveyed what interest he had to one who, after the death of the testator's brother and his wife, petitioned for a partition of the real estate in question. *Held*, that the interest of the children of the testator's brother in the real estate in question vested at the time of the testator's death, and therefore that the petitioner received from F.'s assignee in insolvency an interest in common which gave him a right to a partition. *Jacobs v. Whitney*, 477.

Case involving construction of trust created by will with regard to nature of interest of one of beneficiaries in certain funds, where it was held that in one of funds beneficiary had interest which could be reached and sold by creditor as equitable asset, and any surplus after sale of which and payment of creditor would pass to trustee in bankruptcy under circumstances; while interest in other funds was not of such nature, see EQUITY JURISDICTION, 11, 12; BANKRUPTCY, 1.

What Share.

2. The will of a married woman, who died without issue leaving her husband surviving her, after exercising a power of appointment, and making thereby a certain provision for her husband, which in case of his death before her should become the property of his heirs at law, and after making various legacies, and providing, that, if she should survive her husband, all property to which she should have become entitled from his estate should go to his heirs at law, contained the following provision: "It is my will that my said husband, J., shall have the same share in the residue of my estate which he would have had by law in the entire estate, had no will been made, and, if he is not living at my decease, it is my will that the share which he would have had under this clause shall go to his heirs at law." In a provision in the attesting clause of the will relating to an erasure and the interlining of certain words the foregoing clause was described as "the residuary clause." *Held*, that the clause did not mean that the husband of the testatrix should receive the portion of the whole estate which he would have received in the event of intestacy, and, further, that the clause did not mean that after the husband had received the share described in the clause, the property remaining should be treated as intestate property in which the husband also would share, but that by the provisions of the clause the testatrix had limited and specified so clearly the portion which she intended her husband to receive from the residue of her estate as to amount by implication to a disposition of the

Devise and Legacy (continued).

balance among her other heirs at law to the exclusion of her husband; that, therefore, the husband should receive the same share of the residue which he would have received if no will had been made, that is, \$5,000 and one half the remainder of the residue, and that the other half of the residue should be distributed among the next of kin of the testatrix. *Jones v. Gane*, 37.

Effect of Unproved Foreign Will.

Land in this Commonwealth, undertaken to be devised by will of one, who died domiciled in another State and whose will has been proved in that State only, may be treated as intestate property in this Commonwealth in suit to redeem it from tax sale, see **TAX**, 9.

DISTRICT COURT.

See **POLICE, DISTRICT, AND MUNICIPAL COURTS.**

DIVORCE.

See **MARRIAGE AND DIVORCE.**

DOMICIL.

1. One, who has come into this Commonwealth with the intention of residing here permanently and without any intention of returning to a former place of abode and remains with his wife at a hotel in a city in this Commonwealth for about two weeks, entertaining friends and looking around to find a suitable house in which to live permanently in the suburbs of the city, has acquired a domicile in this Commonwealth, although in no particular city or town. *Winans v. Winans*, 388.
2. If a man comes here with his wife after their marriage in New York for the purpose of making his home permanently in this Commonwealth, although he is undecided as to the city or town in which he will reside, and remains at a hotel in a city of this Commonwealth for less than two weeks, looking around for a house in the suburbs in which to live permanently, after which he and his wife leave for a health resort in another State at the request of his mother, who is ill there, and he, before leaving the city in this Commonwealth, authorizes his wife's sister to find a suitable apartment for him and his wife in a certain town adjoining that city, and she does so, and he afterwards sends his clothes there, but when he is on his way there with his wife stops off in New York, and thereafter never rejoins his wife or returns to this Commonwealth, he has acquired a domicile in this Commonwealth; and, at the trial of a libel against him for divorce, a finding by the trial judge that the libellee and his wife never "lived together as husband and wife in this Commonwealth" within the meaning of R. L. c. 152, § 4, is not warranted in law. *Ibid.*

DURESS.

Contract of owner of coal business with railroad company, providing for use of company's side track by owner of coal business, who agreed that he would assume and hold company harmless from all damage caused to his buildings by fire from company's locomotives, which was held not to be invalid because procured by duress practised by company, see CONTRACT, 8.

ELECTION.

Nature and effect of election by beneficiary, whose fiduciary has mingled beneficiary's funds with his own funds and then has been adjudicated bankrupt, to prove with general creditors in bankruptcy proceedings, see TRUST, 4.

Action by assignee of salesman against employer upon contract of employment, involving questions whether under provision in contract that, if either party did not desire to renew it at end of one year, he should give other notice in writing thereof, there was evidence which would warrant finding that parties elected to renew contract, see CONTRACT, 16.

Case where, at trial of action by employee against employer in which declaration contained counts under employers' liability act and at common law and plaintiff elected to strike out all but common law count and received a verdict thereon, this court, upon deciding that there was no cause of action on the common law count, nevertheless did not order judgment for defendant under St. 1909, c. 236, but by its rescript gave leave to Superior Court to permit plaintiff to amend declaration and proceed upon count under statute, see PRACTICE, CIVIL, 20.

ELECTIONS.

Various questions which arose as to validity of election of city solicitor of Cambridge by concurrent vote of city council, see CAMBRIDGE, 1-4.

ELECTRICITY.

One employing electricity for his own purposes is held to high degree of care, see NEGLIGENCE, 63.

Application of above principle, see NEGLIGENCE, 64.

ELECTRIC RAILROAD.

Petitions for writ of certiorari to correct alleged errors of railroad commissioners in entertaining second application for certificate that public necessity and convenience required construction of railroad, in which various questions of procedure were determined and petitions were dismissed because commissioners made no error, see RAILROAD COMMISSIONERS, 1; CERTIORARI, 1-3.

EMPLOYER'S LIABILITY.

See NEGLIGENCE, 1-27; PLEADING, CIVIL, 1; AGENCY, 4; EVIDENCE, 6, 8, 9.

EQUITY JURISDICTION.

Res Judicata.

1. The question, whether the cause of action in an action at law is essentially the same as that in a suit in equity, previously brought, which after a hearing upon the merits was dismissed, so that the final decree in the suit in equity is a bar to the later action at law as to every issue in the earlier suit that in fact was or in law might have been litigated, is not determined solely by the fact that both the suit in equity and the action at law originated in the same series of transactions and in conversations and communications which took place between the parties concerning them. *Newhall v. Enterprise Mining Co.* 585.
2. The plaintiff in a bill in equity against a mining corporation alleged that one W., who was the promoter, treasurer and a director of the defendant, by false and fraudulent representations of fact induced the plaintiff to purchase certain of the capital stock of the defendant which it owned, and sought a rescission of the purchase and a return of what he paid therefor. At the hearing of the suit upon its merits the plaintiff for the first time discovered from admissions of officers of the defendant that only about one third of the stock which had been sold to him was stock which the defendant had owned and the proceeds of the sale of which had gone into its treasury. The judge who heard the suit found that the plaintiff had not established his allegations of fraud, and that at any rate his suit was brought too long after the sale, and dismissed the bill. Thereafter the plaintiff elected to rescind the sale and brought an action at law to recover back what he had paid for the stock to the defendant's agent because, while he had agreed to purchase stock owned by the defendant, the proceeds of the sale of which would have gone into the corporation's treasury, only one third of the stock which the defendant's agent had sold to him was what he had agreed to purchase, the remaining being stock of the agent himself, the proceeds of the sale of which did not go to the corporation. The defendant set up as a defense the final decree in the suit in equity, and the judge, who heard the case without a jury, ruled that the defense was adequate and found for the defendant. Upon exceptions by the plaintiff, it was *held*, that the decree in the suit in equity was not a bar to the action at law, since, although the different causes of action related to the same transaction, they were founded upon different features of it which had no necessary relation to each other and were very different in their nature. *Ibid.*

Statute of Limitations.

Statute, which attempted to extend time within which land could be redeemed from tax sales already made under R. L. c. 18, §§ 58, 75, would be unconstitutional, see CONSTITUTIONAL LAW, 1.

Consequent construction of St. 1905, c. 325, § 8, amending R. L. c. 13, § 75, so that it applied only to sales made after its passage, see *post*, 5.

Remedy at Law.

Petition by receiver of insolvent incorporated social club against members for dues and payment for food and refreshment, which was held not to be maintainable because remedy was at law, see *post*, 15.

Multiplicity of Suits.

Application of principle that equity will not maintain suit to avoid multiplicity of suits if such multiplicity is necessary to attain ends of justice, and consequent dismissal of petition by receiver of insolvent incorporated social club against members for dues and payment for food and refreshment, see *post*, 15.

Specific Performance.

8. Where an oral agreement for the sale of land, which originally was unenforceable by the purchaser by reason of R. L. c. 74, § 1, cl. 4, has been partly performed by the purchaser by paying the purchase price, by taking possession of the land, and by suffering substantial loss either through a change in his situation or the making of improvements upon the estate, and where the purchaser cannot be restored to his original situation, he may maintain a suit in equity for specific performance of the contract. *Williams v. Carty*, 896.

4. A bill in equity, which sought to enforce specific performance of an oral contract by which the defendant agreed to convey and the plaintiff, a woman, agreed to purchase a farm called the "H. place," alleged that included in the "H. place" was a valuable orchard called the "T. lot," that the defendant dissuaded the plaintiff from having the title examined before delivery of the deed and by false and fraudulent representations executed and delivered and induced the plaintiff to accept a deed which omitted from its description the "T. lot," that for the deed the plaintiff paid some cash and gave a note secured by a mortgage, supposing that the deed included in its description the whole of the "H. place," that the plaintiff took possession under the deed believing "that she had taken possession of the whole of" the "H. place," that she moved her household furniture and belongings from another town to the buildings upon the "H. place," and in further reliance upon the representations of the defendant gave up a comfortable home and a profitable employment and business, that after taking possession she had made valuable improvements upon the place, and that thirteen days after taking possession she discovered that the "T. lot" was not included in the defendant's deed. It was

Equity Jurisdiction (continued).

not distinctly averred that the improvements were made by the plaintiff before she discovered the defendant's fraud. The defendant demurred on the ground that the bill sought the enforcement of a contract for the sale of lands without the memorandum required by R. L. c. 74, § 1, cl. 4. *Held*, that since the plaintiff when she took possession thought she was taking possession of the whole "H. place," according to the agreement of the parties which the defendant by his own fraud failed to express in the deed, the defendant might be presumed to have given up, and the plaintiff to have taken, possession of the whole "H. place," that the removal by the plaintiff to the place newly purchased must have been contemplated by the defendant, and that the giving up of her business by the plaintiff might have been found to have been induced by the act of the defendant, and therefore that the case was distinguishable from *Glass v. Hulbert*, 102 Mass. 24, there having been a part performance and a change of situation on the part of the plaintiff which estopped the defendant from setting up the statute of frauds, and that the defendant's demurrer should be overruled. *Williams v. Carty*, 396.

Whether court had jurisdiction of certain suit in equity against Commonwealth to enforce performance of contract alleged to have been made by harbor and land commissioners, see *CONTRACT*, 12.

For Rescission of Contract.

Suit in equity for rescission of purchase of shares of capital stock of corporation in which plaintiff contended that promoter fraudulently had sold him shares of his own instead of shares of treasury stock of corporation, so that purchase money had gone to promoter instead of to corporation, and it was held that plaintiff was not barred by determination against him of previous suit, see *ante*, 2.

To cancel Tax Deed.

5. R. L. c. 18, § 75, giving to the Supreme Judicial Court and to the Superior Court jurisdiction in equity in all cases of taking or sale of land for the payment of taxes if "relief is sought within five years after the taking or sale," was amended by St. 1905, c. 325, § 8, which was approved on April 21, 1905, so that the period of limitation was made six years instead of five years. A suit in equity was begun on December 11, 1907, to cancel and discharge a tax deed given after a sale which occurred on January 10, 1902. *Held*, that the suit must be dismissed, because the amendment to the statute is applicable only to tax sales made after its passage. *Solis v. Williams*, 350.

To relieve from Fraud.

6. Where, in a bill in equity, fraud on the part of the defendant is averred and is made one of the grounds for relief sought in the impeaching and setting aside of a certain transaction, evidence tending to show the relation of the parties to the alleged fraud and their conduct and their motives is admissible to explain the nature of the transaction which it is sought to impeach and set aside. *Solis v. Williams*, 350.

7. A court of equity will not concern itself with the respective rights among themselves of wrongdoers who are defendants in a suit in equity to set aside a sale procured by their fraud. *Johnson v. Scott*, 294.
 8. One, who had purchased at a tax sale in another State land, which was described in the deed given to him only as "1577 acres in F. grant," and who thereafter was informed by various persons in official positions that the title which he had procured was of no value, thereafter represented to a prospective purchaser that the title to the land was unquestionable and that he knew nothing questionable about it, and, with the aid of an agent, who knowingly made like false representations, induced the prospective purchaser to buy the land without investigating the title, and to give to the holder of the tax deed \$1,201 and to the agent, as a part of the same transaction, a note for \$1,299, secured by a mortgage, to cover the amount of \$1,300 which he supposed the agent was lending to him and which he supposed was paid to the seller. The agent paid the seller only \$600. The tax title was worthless. *Held*, that the purchaser might maintain a suit in equity to rescind the transaction and to have the seller and the agent place him *in statu quo*. *Ibid*.
 9. In a suit in equity to rescind for fraud a sale and conveyance to the plaintiff of all of the defendant's right, title and interest in certain real estate in another State and to restore to the plaintiff what he paid therefor, the plaintiff introduced before a master, to whom the suit was referred, evidence tending to show that the defendant had purchased the land at a tax sale in the State where it was situated, but that shortly afterwards the defendant had been told by various persons in official positions that in their opinions his title so procured was of no value, and had been shown evidences that others were claiming the land, that thereafter he represented to the plaintiff that his title was unquestionable and that he knew nothing questionable about it, and by various means induced him to purchase the land without investigating the title. *Held*, that the question, whether the defendant's title was of value, was one of fact for the master to pass upon, and that its determination in no way depended upon whether the defendant's tax deed had or had not been avoided by a court of the State where the land was situated. *Ibid*.
- For purpose of assessing damages in suit in equity to rescind for fraud sale of shares of capital stock of corporation, where defendant had disposed of stock to *bona fide* purchaser for value before bringing of suit, value of stock at time when defendant procured stock from plaintiff should be taken, see DAMAGES, 4.
- Suit in equity for rescission of purchase of shares of capital stock of corporation in which plaintiff contended that promoter fraudulently had sold him shares of his own instead of shares of treasury stock of corporation, so that purchase money had gone to promoter instead of to corporation, and it was held that plaintiff was not barred by determination against him of previous suit, see *ante*, 2.

Suit by Creditor, who attached Real Estate subject to Mortgage, to reach Surplus after Foreclosure Sale.

10. Where a levy has been made upon the interest of a judgment debtor in certain real estate and thereafter one, who was the holder of certain mortgages which were entitled to priority over the levy, has foreclosed the mortgages by sale and, after the satisfying of the mortgage debts, holds a sum as a surplus, the judgment creditor is entitled, subject to liens, if any, which may have intervened between the time of the recording of the mortgages which were foreclosed and the time of the levy on his execution, to reach such surplus by a bill in equity and to apply it toward the payment of the judgment debt. *Hunneman v. Lowell Institution for Savings*, 441.

To reach and apply Equitable Assets.

11. In a suit in equity under R. L. c. 159, § 8, cl. 7, to reach and apply to the payment of a debt due to the plaintiff from the principal defendant the interest of that defendant under the will of his grandfather, such defendant's share as one of his father's children in a fund of which his father, who is living, enjoys the income, which will pass to such defendant in case he survives his father but not otherwise, is a present equitable interest, which, although it may be lost by the death of such defendant before the death of his father, is assignable property, the value of which can be ascertained by sale, appraisal or some other means within the ordinary procedure of the court, and which therefore can be reached and applied under the statute. *Clarke v. Fay*, 228.
12. In a suit in equity under R. L. c. 159, § 3, cl. 7, to reach and apply to the payment of a debt due to the plaintiff from the principal defendant the interest of that defendant under the will of his grandfather, it appeared that that will gave the residue of the testator's property to trustees, and, after providing for certain trusts, directed that all the residue of his estate should be divided into as many equal shares as there should be at the time of his decease children of his then living or deceased leaving issue, and then, after providing for the management of the trust and the payment of its expenses, proceeded as follows: "to pay over the residue of the income of such share to the child for whose benefit such share is held, . . . for and during the term of such child's natural life and upon such child's death to convey transfer and pay over the principal of the share so held for such child's benefit to such child's lawful issue then living by representation; but if such child shall die without leaving lawful issue living at the time of such child's death then upon such child's death to add the principal of the share held for such child's benefit equally to the shares held for the benefit of my other children then living . . . provided however that the lawful issue then living of any other child of mine who shall have theretofore deceased shall take and have (and there shall be paid and conveyed to such issue) — by right of representation the same part of such principal which would have been added to the share which would have been held for the benefit of such issue's deceased parent if such issue's

deceased parent was then living." When the bill was filed the father of the principal defendant was living. That defendant had two unmarried sisters, who as well as he were born before the death of the testator. He had had five aunts who were living at the death of the testator, one of whom had died, leaving issue, one of whom was a childless widow, two of whom were married, each of them having a married son without issue, and one of whom was married and had a minor unmarried son. *Held*, that the interest of the principal defendant in his share of the fund of which his father enjoyed the income, although his enjoyment of it was contingent on his surviving his father, was assignable property which could be reached and applied under the statute, but that his interest in the funds of which the incomes were enjoyed respectively by his aunts, and a part of which would come to him if after his father's death and during his own lifetime any of his aunts should die without leaving issue, was not property but a mere possibility of property, which could not be reached under the statute. *Clarke v. Fay*, 228.

Overruling of demurrer based on alleged misjoinder of parties and construction of bill in suit to reach and apply equitable assets, see EQUITY PLEADING AND PRACTICE, 1, 2.

Receivership Proceedings.

13. Upon the averments of a bill in equity, it here was assumed upon demurrer, that, because the provisions of R. L. c. 163, §§ 143-149, relating to proceedings in insolvency by and against insolvent corporations, are suspended by the bankruptcy law of the United States, and because § 4 (b) of the bankruptcy act of 1898 does not include among the corporations which may become bankrupts under that act a corporation organized under R. L. c. 125 as a social club, a suit in equity may be maintained by a judgment creditor of such a corporation so organized, which has become insolvent, for the benefit of himself and other creditors, for the appointment of a receiver to collect all the assets of the corporation and all moneys due to it from its members. *Rogers v. Boston Club*, 261.
14. In a suit in equity for the appointment of a receiver of the property of an insolvent corporation organized as a social club under R. L. c. 125, a receiver was appointed by the court and was directed to collect all the assets of the corporation and all moneys due to it from its members. The receiver filed two petitions in the suit in equity, one for the collection of the regular assessments due from the members and of the debts due from them to the club for food and refreshments, and the other for the collection of a special assessment made under a by-law of the club by its executive committee. Upon the first petition an order was made that service of process should be made upon twelve respondents designated as representatives of a class consisting of the three hundred and forty-three members of the club. A final decree was entered against the twelve designated respondents, ordering the payment of the sums of money found to be due from them respectively. From this decree the respondents appealed.

Equity Jurisdiction (*continued*).

Upon the second petition a decree was entered dismissing the petition. From this decree the receiver appealed. A question being raised whether these appeals were ripe for hearing by this court or whether they must await a final decree in the receivership suit ordering a distribution of the property of the corporation among its creditors, it was *held*, that the appeal from the decree upon the receiver's first petition plainly was ripe for hearing, because the rights of the appealing respondents could not be protected if the hearing was postponed to any later time, and that the appeal of the receiver from the disallowance of his claims founded on the special assessment comprised such substantive elements in the litigation that under the special circumstances of the case that appeal well might be heard with the others. *Rogers v. Boston Club*, 261.

15. A receiver of the property of an insolvent corporation, organized under R. L. c. 125 as a social club, who had been appointed in a suit in equity brought by a judgment creditor for the benefit of himself and other creditors against the corporation, and who had been directed by the court to collect all the assets of the corporation and all moneys due to it from its members, filed a petition in the suit in equity, upon which process was ordered to be served on twelve respondents designated as representatives of a class consisting of three hundred and forty-three members of the club, to collect assessments due from all the members under a by-law of the corporation and also debts due from many of the members for food and other refreshments. *Held*, that the petition could not be maintained, and that the receiver's remedy was at law, the remedy at law not being inadequate by reason of the multiplicity of the actions required to be brought, because such multiplicity was necessary to accomplish the ends of justice on account of the divers interests of the several respondents. *It was intimated*, that the same conclusion might have been reached, even if the receiver had confined his petition to the claims for annual dues against all the different members of the corporation, and had not included the claims against a large number of the members for food and refreshments, which had no more in common than the bills of any one tradesman against his customers. *Ibid*.

Damages.

For purpose of assessing damages in suit in equity to rescind for fraud sale of shares of capital stock of corporation, where defendant had disposed of stock to *bona fide* purchaser for value before bringing of suit, value of stock at time when defendant procured stock from plaintiff should be taken, see DAMAGES, 4.

To declare Mortgage discharged.

See MORTGAGE, 4-6.

As to Action of Railroad Commissioners.

Whether suit in equity or petition for writ of certiorari was proper method to use to correct alleged errors of law in their action as to application for

certificate that public necessity and convenience required construction of electric railroad, see CERTIORARI, 3.

Of Suits against Commonwealth.

Whether court had jurisdiction of certain suit in equity against Commonwealth to enforce performance of contract alleged to have been made by harbor and land commissioners, see CONTRACT, 12.

EQUITY PLEADING AND PRACTICE.

Parties.

1. Where in a suit in equity to reach and apply an equitable interest of the defendant in satisfaction of a judgment debt, the bill alleges that the judgment creditor had sold and assigned his interest in the judgment to another and both the creditor and his assignee are joined as parties plaintiff and it cannot be known in advance whether or not the validity of the assignment will be questioned, a demurrer to the bill on the ground of misjoinder of parties cannot be sustained. *Hunneman v. Lowell Institution for Savings*, 441.

Bill.

2. A bill in equity which sets out the bringing of an action at law, an attachment of certain real estate of the defendant, the procuring of a judgment, and the issuance of an execution, after which the judgment creditor sold and assigned his rights under the judgment and execution to another, and then avers that "within thirty days of the rendition of said judgment" the execution was placed "in the hands of . . . [an officer] . . . who commenced levy on the same," and that "by reason of the before-mentioned attachment" a lien was acquired by the judgment creditor upon the real estate, and that by his assignment "said lien passed with the execution to" the assignee, plainly proceeds upon the theory that the right of the assignee is based upon the attachment, and, if the right gained by the attachment has been lost because it was not enforced within thirty days after judgment, the suit, so far as it relies thereon, must fail. In this case, however, since it seemed that the issue had been fully tried, and that the plaintiff had a right to enforce a lien obtained by a levy on the interest of the judgment debtor in the real estate after judgment, though not on the interest which was attached in the action at law, the plaintiff was given an opportunity to apply in the court where the bill was filed for leave to amend his bill so as properly to set forth that right, and it was ordered that, if such amendment was allowed, a decree, which had been made for the plaintiff and from which the defendant had appealed, should stand. *Hunneman v. Lowell Institution for Savings*, 441.

Demurrer.

Demurrer based on alleged misjoinder of parties in bill in equity to reach and apply equitable assets, which was overruled rightly, see *ante*, 1.

Answer.

8. Where a bill in equity, in which the plaintiffs seek to have the defendant, their brother, declared trustee for himself and them of a burial lot, which was purchased by the defendant and the title to which he took in his own name, avers merely that before the purchase the plaintiffs and the defendant orally agreed that the title should be taken in the name of their father, who had died after the conveyance to the defendant, and does not aver any other promise or contract of the defendant with regard to the matter, and relies only upon oral declarations with regard thereto made by the defendant after the purchase, it is not necessary for the defendant, in order to rely on the provisions of R. L. c. 74, § 1, cl. 4, and of R. L. c. 147, § 1, requiring a memorandum in writing to make such a promise or declaration enforceable, to allege such defense in his answer. *Tourtillotte v. Tourtillotte*, 547.

Amendment.

Upon appeal of suit to this court from decree by Superior Court, it was held that bill did not cover case for which relief was given by decree appealed from, but, it appearing that there had been full trial on merits, case was remanded to Superior Court where amendment to bill might be presented, upon allowance of which decree appealed from might stand, see *ante*, 2.

Memorandum.

From facts stated in memorandum by judge containing his findings of fact in suit in equity, this court on appeal can draw such inferences as reasonably should be made, see *post*, 4.

Exceptions.

Question whether certain evidence properly was excluded by judge hearing suit in equity, which was held under circumstances properly to have been brought before this court by appeal and report of judge containing memorandum stating exclusion of evidence, although generally such questions should be raised by bill of exceptions, see *post*, 5.

Appeal.

4. On appeal from a final decree of a judge of the Superior Court, if the judge filed a memorandum containing his findings of facts, this court can draw such inferences from the facts so found and reported as are reasonably to be made from the facts found and are not inconsistent with any of them. *Knowles v. Knowles*, 290.
5. While it is the general rule that objections to rulings of a single judge at the hearing of a suit in equity as to the admission or exclusion of evidence can be brought before this court only by exceptions and not by an appeal with a report of the facts found or of the evidence, nevertheless where the judge files a "memorandum of facts" containing the facts found by him and also an explicit statement as to the nature of certain

evidence offered by the plaintiff and excluded, with two reasons for excluding it, and states that, "after consultation with counsel I excluded [the evidence] on the latter ground, so that the rights of the plaintiff might be saved," and, after a decree was entered dismissing the bill, the plaintiff appealed, this court held that the correctness of the ruling excluding the evidence was before them for determination. *Knowles v. Knowles*, 290.

Determination of question of fact by judge before whom suit in equity was heard, which was reversed on appeal because it was clearly wrong, see MORTGAGE, 6.

Certain receivership proceedings against incorporated social club, which were held to have reached stage where appeals by certain members from enforcement therein of assessments and dues were ripe for hearing, see EQUITY JURISDICTION, 14.

Upon appeal of suit to this court from decree by Superior Court, it was held that bill did not cover case for which relief was given by decree appealed from, but, it appearing that there had been full trial on merits, case was remanded to Superior Court where amendment to bill might be presented, upon allowance of which decree appealed from might stand, see *ante*, 2.

Remanding of Suit to Superior Court for Further Hearing upon Merits.

6. On an appeal by a defendant from a decree of the Superior Court in a suit in equity, after a rescript had been sent which permitted the plaintiff to apply for leave to amend his bill so as to state grounds for relief in accordance with the facts which were found, and which directed that, if such amendment was allowed, a decree which had been entered for the plaintiff and from which the defendant had appealed should stand, one of several defendants filed in this court a motion that the case be sent back to the Superior Court for a rehearing, and, all parties having been heard in writing on the motion and it appearing that certain facts, which would be material whether the bill was amended or not, had not been called sufficiently to the attention of the trial court and had not appeared in the record which was before this court, the rescript was recalled, the decree of the Superior Court was revoked, and the case was remanded to that court for further hearing, either on the bill as it stood or as it might be amended by leave of that court. *Hunneman v. Lowell Institution for Savings*, 441.

ESTOPPEL.

Recitals in replevin bond as to value of replevied property do not estop plaintiff from proving real value of property when he is sued on bond, see REPLEVIN, 4.

Payments of interest on note by one, who indorsed for accommodation and without consideration and before delivery, do not estop such indorser from setting up lack of consideration in action by payee against him, see BILLS AND NOTES, 3.

Agreement of "subordinate agent" of insurance company to change certain policy so that it would cover property described therein when it was re-

Estoppel (continued).

moved to another building did not bind company nor estop it from defending action on policy on ground that, when property was destroyed, it was not in place where it was when insured, and company had not assented to its removal, see **INSURANCE**, 3.

Suit in equity for specific performance of oral agreement for sale of land, in which it was held, in overruling demurrer to bill, that plaintiff under contract of sale was entitled to conveyance of tract larger than that described in deed to her by defendant if she took possession of what she thought was larger tract and description in deed was inserted by fraud of defendant and plaintiff had paid part of purchase price and had so changed her position as to estop defendant from setting up statute of frauds, see **EQUITY JURISDICTION**, 3, 4.

EVASION OF CARRIAGE HIRE.

R. L. c. 208, § 55, fixing penalty for evasion of fare for use of horse or "carriage," applies to evasion of fare for use of automobile, see **AUTOMOBILE**, 5.

EVIDENCE.

Judicial Notice.

Judicial notice taken of fact that there is only one town called Dartmouth in Bristol County, see **HOMICIDE**, 2.

Presumptions and Burden of Proof.

1. A void tax deed is not *prima facie* evidence of title. *Johnson v. Scott*, 294.

Cases involving doctrine of *res ipsa loquitur*, see **NEGLIGENCE**, 27, 50, 64.

Whether violation of rule of company by employee was *prima facie* evidence of negligence on part of employee, see **NEGLIGENCE**, 28, 43.

Violation of ordinance of town as such *prima facie* negligence, see **NEGLIGENCE**, 28.

In absence of evidence to contrary, common law of another State is presumed to be same as that of our own, although such presumption would not arise as to statutory law of another State, see *post*, 13.

Official act of judge of Land Court in framing issues for Superior Court upon appeal establishes *prima facie* proposition that such issues are pertinent and ought to be tried, see **LAND COURT**, 5.

Recitals in replevin bond as to value of replevied property are evidence of value of property, but not conclusive evidence, in subsequent action upon bond, see **REFLEVIN**, 4.

Presumption, that witnessed note has been paid when it has been due for more than twenty years, is presumption of fact which can be rebutted by any legal evidence, see **BILLS AND NOTES**, 5.

In action by person driving delivery wagon on highway against street railway company, to recover for injuries due to collision of street car with his wagon, violation by motorman of ordinance of town as to speed, and of

rule of company as to slowing down and ringing gong at crossing was held to constitute evidence of negligence, see NEGLIGENCE, 28.

Whether answer of plaintiff, in cross-examination as to certain custom, to carefully prepared question, which gave to custom as to which he had testified in direct examination different aspect and one unfavorable to his contentions, should be adopted as true, was held to be question for jury, and judge was held to have been warranted in refusing to instruct jury on basis solely of such answer in cross-examination, see PRACTICE, CIVIL, 8.

Admissions and Confessions.

2. A plaintiff should not be allowed in cross-examination of a witness for the defendant to show that there had been an attempt or offer to compromise the plaintiff's claim. *Greibenstein v. Stone & Webster Engineering Corp.* 431.

Proof of existence of partnership by separate admissions of individuals composing it, see PARTNERSHIP, 1.

Testimony, offered in rebuttal at trial of action by employee against employer to recover for personal injuries resulting from alleged defective condition of buzz planer, which tended to show that after accident defendant's superintendent said, "I will see that no one else runs that machine but myself until it is fixed," was admitted, not as being admission binding defendant, but as tending to contradict previous testimony of superintendent, see NEGLIGENCE, 19.

Best and Secondary.

Testimony of plaintiff, given without objection, that he had purchased and was owner of certain premises, was held to be sufficient to warrant finding that he was entitled to rent under lease as owner of reversion therein without assignment of lease being introduced in evidence, see LANDLORD AND TENANT, 1.

Opinion: Experts.

8. The fact that a witness is not offered as an expert by the party calling him will not prevent the other side from using him as such if it turns out that he has the necessary qualifications. *Martin v. Boston & Northern Street Railway*, 16.

4. While the general rule is that the final decision of the question, whether a witness is qualified as an expert, is for the judge presiding at the trial, nevertheless, when the facts upon which the decision depends are undisputed, the question becomes one of law, and the decision may be reviewed. *Ibid.*

5. At the trial of an action against a street railway company for personal injuries alleged to have been caused by an explosion of the electric controller on one of the defendant's cars on a certain evening, a witness for the defendant, besides testifying at length in description of the electrical equipment of the car and of the controller in question, stated that he had examined the controller on the evening of the accident and "found it

Evidence (continued).

O. K." He also testified in direct examination that he was employed by the defendant as foreman of its electrical equipment from 1892 to 1903, and had been working as an electrician in the employ of another person since 1903. In cross-examination he was asked as to his experience with a controller and stated that he could take it apart and put it together again and that he understood its principle and mechanism "to a certain extent. I don't know as I understand it the same as an expert would." He then was asked certain questions which called for his opinion as an expert. The presiding judge subject to an exception by the plaintiff excluded "anything in the nature of an opinion." *Held*, that the facts regarding the qualifications of the witness were not so clear and undisputed that it could be said as a matter of law that the trial judge was wrong in excluding the opinion of the witness as evidence. *Martin v. Boston & Northern Street Railway*, 16.

6. In an action by a workman employed in a hat factory against his employers, for personal injuries caused by a block on which hats were piled to preserve their shape falling from a table upon the feet of the plaintiff, while in the course of his duty he was trying to take a pile of hats from the table, the jury returned a verdict for the defendants, and the plaintiff alleged exceptions to the refusal of the presiding judge to allow the plaintiff to ask the defendants' superintendent whether the unfastened block was a dangerous appliance. *Held*, that the refusal was proper, because the question was one to be decided by the jury and was not a subject for expert testimony. *Walker v. Williamson*, 514.

Questions, asked in cross-examination of medical expert of defendant at trial of action of tort for personal injuries, relating to occurrences at physical examination of plaintiff by witness, which were deemed proper, see *WITNESS*, 1.

Proper questions to ask of one testifying at trial of action by employee in woodworking establishment to recover from employer for injuries alleged to have been due to defective condition of buzz planer, see *NEGLIGENCE*, 20.

Ruling as to weight to be given to testimony of medical experts testifying for Commonwealth at trial of indictment for murder, which was held to have been refused rightly, see *HOMICIDE*, 18.

Extrinsic affecting Writings.

7. At the trial of an action of contract where the declaration alleged that the defendant, in consideration of the plaintiff's forbearance to sue him for injuries resulting from alleged negligence on the part of the defendant, promised to pay the plaintiff \$100 and certain wages until he had fully recovered, but, after paying the wages for a time, refused to do so further, evidence of the plaintiff tended to show that an oral agreement to such effect was made between the plaintiff and an agent of the defendant, that then the defendant's agent drew up what he said was a memorandum of the agreement which, after the plaintiff had started to sign it, he finally refused to sign because it did not contain the agreement for the payment of future wages, and that thereupon the defendant's agent tore up the

memorandum and drew one containing the agreement as to wages properly stated, which the plaintiff signed and gave to the agent, who paid him \$100. The evidence of the defendant contradicted that of the plaintiff. No such memorandum as that testified to by the plaintiff's witnesses was produced by the defendant, but the defendant did produce a paper purporting to be signed by the plaintiff by which he acknowledged the receipt of "wages in full, medical attendance, and \$100 settlement in full." The defendant's agent testified that the plaintiff signed such paper and that it was the only one that he did sign. The plaintiff's witnesses denied that the plaintiff signed it. At the close of the evidence the defendant asked that all of the evidence as to the oral agreement made between the plaintiff and the defendant's agent be stricken out. The presiding judge refused to order that the evidence be stricken out, and instructed the jury that, if the negotiations resulted in a written agreement between the parties, the action could not be maintained. The jury found for the plaintiff. *Held*, that the evidence warranted a finding that the agreement between the parties had not been reduced to writing, that the jury must have found so, and therefore that the ruling asked for by the defendant was refused rightly. *Laprade v. Fitchburg & Leominster Street Railway*, 77.

Remoteness.

8. In an action by a workman employed in a hat factory against his employers, for personal injuries caused by a block on which hats were piled to preserve their shape falling from a table upon the feet of the plaintiff, while in the course of his duty he was trying to take a pile of hats from the table, the jury returned a verdict for the defendants, and the plaintiff alleged exceptions to the exclusion by the presiding judge of evidence offered by the plaintiff to prove that the block had fallen in a similar way before. *Held*, that the evidence was objectionable as raising collateral issues, and properly could be excluded in the discretion of the presiding judge. *Walker v. Williamson*, 514.

Evidence offered by defendant at trial of indictment for murder, which was held to have been rightly excluded as too remote from issues, see *HOMICIDE*, 12.

Competency.

9. In proving incompetency of a servant of the defendant in an action for personal injuries by an employee against his employer, evidence of a previous accident to the plaintiff caused by the negligence of the servant is not competent. *Greibenstein v. Stone & Webster Engineering Corp.* 481.
10. At the trial of a complaint for operating an automobile at a rate of speed exceeding twelve miles an hour in violation of a lawful regulation of a board of park commissioners, the Commonwealth offered in evidence an instrument called a photo-speed-recorder, which had been used by the witness who produced it to ascertain the speed at which the defendant's automobile was moving at the time in question, and which consisted of two photographic cameras set side by side, provided with a mechanism which automatically exposed one of the cameras one second before the other one,

Evidence (continued).

- and also provided with a chronometer arranged as a stop watch. The Commonwealth offered to prove that the chronometer contained in the instrument had been compared by the witness with stop watches carried by two other witnesses and also with the standard chronometer in the physical laboratory of the Massachusetts Institute of Technology and had been found in each case to be accurate. *Held*, that this evidence was admissible and justified the trial judge in submitting the question of the accuracy of the chronometer to the jury, and that the evidence also was sufficient to warrant a finding by the jury that the chronometer was a correct recorder of time. *Commonwealth v. Buxton*, 49.
- Competency, as evidence in action where insurance company is not party, of application for insurance, copy of which was not attached to policy afterward issued thereon, see *INSURANCE*, 1.
- Evidence which was offered to prove *alibi* at trial of indictment for murder and which was held to have been excluded rightly because it was incompetent, see *HOMICIDE*, 15.
- Evidence which was held to be pertinent and competent to show agency of one in office of steamship company who received money for transmission to foreign country, see *AGENCY*, 2.
- Evidence of adoption after accident to plaintiff of means to prevent repetition of action such as happened to plaintiff in action against elevated railway company was held not competent on question of defendant's negligence, see *NEGLIGENCE*, 52.
- Evidence competent to show acquiescence by vendor in proposal by purchaser to rescind contract for sale of coal, see *CONTRACT*, 18.
- Evidence of attempt to intimidate witness is inadmissible in absence of evidence tending to show connection of party, against whom witness was to testify, with acts of intimidation, see *WITNESS*, 2.

Relevancy and Materiality.

- Evidence which was held to have been relevant and material and rightly to have been admitted at trial of indictment for murder, see *HOMICIDE*, 7, 10, 11.
- Comment thereon in charge of judge which was held to have been proper, see *HOMICIDE*, 19-21.
- Certain evidence which was held to be immaterial at trial of complaints for having in possession with intent to sell milk below standard set by statute, see *MILK*, 2-4.
- What evidence is relevant and material to prove fraud in suit in equity in which fraud is made one of grounds for relief in setting aside certain transaction, see *EQUITY JURISDICTION*, 6.
- In action by employee for injury caused by falling of plank due to cutting of wire supporting plank, it was held that negligent act which caused injury might have been found to have been determination by superintendent to cut wire, although he himself acted upon determination and cut wire, and therefore evidence of direction by general superintendent to superintendent earlier in day to examine to see if wire should be cut was held to be immaterial, see *NEGLIGENCE*, 7.

Evidence tending to show that person riding on front platform of street railway car knew of notice that one did so at his own risk was held rightly to have been excluded as immaterial in action against street railway company for such person's death, since he was passenger at any rate, and whether or not he was in exercise of due care did not affect statutory liability of defendant, *see NEGLIGENCE*, 45, 46.

Admitted without Objection.

11. Evidence, which would have been excluded as incompetent upon objection, if it is admitted and remains in the case without objection, should be given its probative force. *Bagley v. Wonderland Co.* 238.

Memorandum.

12. At the trial of an action of tort where evidence as to the nature and extent of the plaintiff's business was admissible as bearing upon the question of damages that might be recovered for the alleged tort of the defendant, the plaintiff produced no books of account, but testified as to his business from certain memoranda in pencil, which he had drawn up on the morning of the trial with the assistance of his counsel. The counsel for the defendant took from the plaintiff the memoranda and cross-examined him with regard to them. On redirect examination of the plaintiff, the plaintiff's counsel offered the memoranda in evidence and they were admitted subject to an exception by the defendant. *Held*, that it could not be said that the presiding judge acted improperly, since he might well have thought that the memoranda would help the jury to understand the cross-examination better. *Morrin v. Manning*, 205.

Foreign Law.

13. In an action of tort by an employee against his employer to recover for personal injuries received while the plaintiff was at work for the defendant in another State, the declaration contained counts under R. L. c. 106, § 71, and a count at common law. The defendant did not raise the objection that the defendant's liability should be determined by the law of the place of the accident but was content to rest his liability upon both the common and the statutory law of this Commonwealth. No evidence, therefore, of the law of the State where the injury to the plaintiff was received was introduced, but it was said that, in the absence of evidence to the contrary, the common law of the place of the accident would be presumed to be the same as that of this Commonwealth, although such presumption would not arise as to the statutory law of the other State. *Corno v. Boston Bridge Works*, 366.

Of Experiments.

14. In order that experiments made by means of a machine or mechanical instrument should be admissible in evidence it is not necessary that the machine or instrument should have been operated by an expert, if there

Evidence (continued).

- is evidence tending to show that accurate results can be reached by the use of the machine by one not an expert. *Commonwealth v. Buxton*, 49.
15. At the trial of a complaint for operating an automobile at a rate of speed exceeding twelve miles an hour in violation of a lawful regulation of a board of park commissioners, the Commonwealth offered in evidence an instrument called a photo-speed-recorder, which had been used by the witness who produced it to ascertain the speed at which the defendant's automobile was moving at the time in question, and which consisted of two photographic cameras set side by side, provided with a mechanism which automatically exposed one of the cameras one second before the other one, and also provided with a chronometer arranged as a stop watch. To determine speed by the use of the instrument a formula was employed which made it necessary to know the distance of the external object from the lens of the camera and the distance of the image on the photographic plate from the lens as well as the size of the object and the size of the image. The Commonwealth offered to show that the witness who tested the speed of the defendant's automobile by the use of the instrument, before making the test, had been furnished with and knew the distance of the image from the lens in each camera and that he had photographed ten times with each camera an object at distances varying from thirty to three hundred feet, that he had measured the length of the object and by means of the formula had calculated the distance of the object from the camera, and that afterwards he had measured this distance with a tape and found it to be the same as shown by the estimate. The defendant objected to the evidence of the experiments as inadmissible because of the insufficiency of the experiments and because of the difference of the conditions from those under which the speed of his automobile while in motion was tested by the use of the instrument. *Held*, that the question whether evidence of experiments should be admitted depends largely on the discretion of the trial judge, and that this court could not say as matter of law that the evidence did not justify the judge in coming to the conclusion that the experiments would be useful in determining the speed of the car. *Ibid*.

Of Habits and Character.

16. In a criminal case, as in a civil one, the fact that a person did an act cannot be proved by evidence that his habits were such that he would have been likely to do it, and this rule applies to evidence offered by a defendant as much as to evidence offered by the prosecution. *Commonwealth v. Rivet*, 464.

Proper application of foregoing principle at trial of indictment for murder, see HOMICIDE, 8.

Of Motive.

If defendant in criminal case desires evidence, which was offered solely on question of motive, restricted to that issue, he should ask for instructions to that effect, see PRACTICE, CRIMINAL, 1.

Evidence offered by Commonwealth at trial of indictment for murder, which tended to show motive for crime, see HOMICIDE, 6, 7.

Affecting Credibility of Witness.

Rulings on evidence offered at trial of indictment for murder to affect credibility of witnesses, see HOMICIDE, 13, 14.

Of Attempt to intimidate Witness.

Evidence of attempt to intimidate witness is inadmissible in absence of evidence tending to show connection of party, against whom witness was to testify, with acts of intimidation, see WITNESS, 2.

Of Speed.

Proof by means of photo-speed-recorder of speed at which automobile was being operated, see *ante*, 10, 14, 15.

Of Assent by Silence.

Silence of conductor standing by side of partly opened door of semi-convertible street railway car was held to warrant finding that he assented to persons entering door, see STREET RAILWAY, 2.

Of Fraud.

Evidence, which was held to be insufficient to sustain allegations of fraud, see FRAUD, 1.

Of State of Mind.

Evidence which was held rightly to have been admitted at trial of indictment for murder as tending to show cheerful state of mind of deceased, defendant contending that deceased had committed suicide, see HOMICIDE, 8.

Of Attempt at Compromise.

Evidence of attempt of party to compromise claim on which action being tried is based is inadmissible, see *ante*, 2.

Violation of Rule as Evidence of Negligence.

Case where violation of rule was held not to be *prima facie* evidence of negligence, see NEGLIGENCE, 43.

In action by person driving delivery wagon on highway against street railway company, to recover for injuries due to collision of street car with his wagon, violation by motorman of ordinance of town as to speed, and of rule of company as to slowing down and ringing gong at crossing was held to constitute evidence of negligence, see NEGLIGENCE, 28.

Violation of Ordinance as Evidence of Negligence.

In action by person driving delivery wagon on highway against street railway company, to recover for injuries due to collision of street car with his wagon, violation by motorman of ordinance of town as to speed, and of rule of company as to slowing down and ringing gong at crossing was held to constitute evidence of negligence, see NEGLIGENCE, 28.

In Rebuttal.

Testimony, offered in rebuttal at trial of action by employee against employer to recover for personal injuries resulting from alleged defective condition of buzz planer, which tended to show that after accident defendant's superintendent said "I will see that no one else runs that machine but myself until it is fixed," was admitted as tending to contradict previous testimony of superintendent, but not as admission binding defendant, see NEGLIGENCE, 19.

Deposition.

Case where, in cross-examination of witness in taking of his deposition, long statement of third party which related to matters in controversy in, and contained opinion as to responsibility for personal injuries for which, action was brought by employee against employer, was read into record, and where judge presiding at trial of action was held not to have acted improperly in permitting such part of deposition to be read to jury, see WITNESS, 8.

EXCEPTIONS.

Effect of certain order of Superior Court as to entry of exceptions in Supreme Judicial Court, see PRACTICE, CIVIL, 11.

In actions at law, see PRACTICE, CIVIL, 11-20; CONTRACT, 15.

In suits in equity, see EQUITY PLEADING AND PRACTICE, 5.

In proceedings in Land Court, see LAND COURT, 1.

At trial of Probate Court appeals, see PROBATE COURT, 1.

EXECUTION.

Assignment.

Transfer of execution by judgment creditor to company which had been surety on bond to dissolve attachment was held to be assignment and not payment of execution, see *post*, 2.

Levy.

1. In an action of contract an attachment of real estate of the defendant was made. Certain mortgages of the defendant to a savings bank were entitled to priority over the attachment. On a June 1, the plaintiff recovered judgment and an execution issued, which was delivered to a deputy sheriff, whose return showed that he "seized and took" all the right, title and interest which the judgment debtor "had (not exempt by law from attachment or levy on execution) on" June 30, that being the time "when the same was taken on execution." Nothing further was done by the deputy sheriff, and on July 28 the savings bank sold the real estate in foreclosure of its mortgages. *Held*, that the levy by the deputy sheriff was upon the interest in the real estate existing at the time of the levy and not upon the interest attached upon mesne process, and that the title which had been gained by the attachment therefore was lost before

the foreclosure sale by the lapse of the thirty days after which, by R. L. c. 167, § 55, the attachment became of no effect. *Hunneman v. Lowell Institution for Savings*, 441.

Discharge.

2. In a suit in equity by the assignee of a judgment creditor to enforce an execution issued upon the judgment, it appeared that in the action in which the judgment was entered the creditor had attached real estate of the defendant and that the defendant also, without discharging the attachment, had given a bond with a surety company as surety conditioned upon the payment of whatever judgment the creditor should procure, that after the creditor had procured the judgment the surety company paid to him the amount of it and the creditor assigned to the surety company all his rights under the judgment and execution, and that it was the express intention of both parties to the transaction that it should be a sale of the creditor's rights under the judgment and execution with the purpose of keeping the execution alive and not a "payment under the execution." *Held*, that the execution was not satisfied and was still alive. *Hunneman v. Lowell Institution for Savings*, 441.

EXECUTOR AND ADMINISTRATOR.

Action of contract based on consideration of forbearance from litigating claim that will of father of plaintiff and defendant was procured by undue influence of defendant, wherein it was held that contract was supported by good consideration and that fact that defendant was executor and had promised to pay plaintiff amount of general legacy made to her in will, estate being insolvent, did not cause action to be barred by R. L. c. 74, § 1, cl. 1, see CONTRACT, 3-5, 10; FRAUDS, STATUTE OF, 1.

FIRE.

Insurance against loss by fire, see INSURANCE, 3.

FIRE DISTRICT.

Vote of fire district to employ person at certain salary as watchman, which was ineffectual because at time vote was passed there was no money in treasury of district and none was appropriated afterward for payment of watchman's salary, see CONTRACT, 9.

FIXTURES.

Sale by owner of land of fixtures thereon gives purchaser right to come upon land and remove them, see CONTRACT, 6.
Application of such principle, see CONTRACT, 6, 7.

FLATS.

Commonwealth Flats, see that title.

FRAUD.

1. In an action for the amount of a deposit made by the plaintiff under an agreement in writing with the defendant, where the plaintiff based his right to recover on the ground that after the execution of the agreement the defendant by fraud procured from the plaintiff his signature to a second agreement to be substituted for the first, and that thereupon the plaintiff surrendered the first agreement to the defendant who destroyed it, and the case was tried solely on this issue, the plaintiff at first testified that the defendant did not read the new agreement aloud to him, but asked him to sign it. He then testified that the defendant did read it "kind of loud," but that he could not understand it; that the defendant told him nothing about the new agreement but simply asked him to sign it; and that he had no idea why he signed the new agreement or gave up the first one. On redirect examination the plaintiff testified that the defendant read the new agreement to the defendant's bookkeeper; that he could understand him reading it, but testified, "There was no use in my understanding it when I didn't know anything about it." In answer to a question whether the defendant read the agreement so that the plaintiff knew the contents of it, the plaintiff said, "Of course, if I had any understanding about it, or if I was in any way smart or intelligent, I suppose I would have understood it; but I didn't." On re-cross-examination the plaintiff testified that he could not say whether the defendant read the new agreement to him or to the defendant's bookkeeper, and could not say whether the bookkeeper read it to him. There was nothing in the other testimony which added to these statements. *Held*, that there was no evidence to be submitted to the jury that the plaintiff's signature to the second agreement had been procured by fraud on the part of the defendant, and that a verdict should have been ordered for the defendant. *Kiely v. Corbett*, 158.

What constitutes undue influence sufficient to invalidate will, see **UNDUE INFLUENCE**, 1, 2.

What evidence is relevant and material to prove fraud in suit in equity in which fraud is made one of grounds for relief in setting aside certain transaction, see **EQUITY JURISDICTION**, 6.

Suit in equity by purchaser to rescind sale to him of tax title to land in Maine and for repayment of what he paid defendants therefor, on ground that defendants procured sale by fraud, see **EQUITY JURISDICTION**, 7-9.

For purpose of assessing damages in suit in equity to rescind for fraud sale of shares of capital stock of corporation, where defendant had disposed of shares to *bona fide* purchaser for value before bringing of suit, value of shares at time when defendant procured them from plaintiff should be taken, see **DAMAGES**, 4.

Suit in equity for rescission of purchase of shares of capital stock of corporation in which plaintiff contended that promoter fraudulently had sold him shares of his own instead of shares of treasury stock of corporation, so that purchase money had gone to promoter instead of to corporation, and

it was held that plaintiff was not barred by determination against him of previous suit, see EQUITY JURISDICTION, 2.

Suit in equity for specific performance of oral agreement for sale of land, in which it was held, in overruling demurrer to bill, that under contract of sale plaintiff was entitled to conveyance of tract larger than that described in deed to her by defendant if she had taken possession of what she thought was larger tract and description in deed was inserted by fraud of defendant and plaintiff had paid part of purchase price and had so changed her position as to estop defendant from setting up statute of frauds, see EQUITY JURISDICTION, 8, 4.

FRAUDS, STATUTE OF.

1. If a brother, who was named as executor in the will of his father, who had died leaving personal estate which was not more than sufficient to pay the expenses of the last sickness, of the funeral and of the administration of the estate, and real estate all of which was devised specifically to the brother and to his son, before the will is proved promises his sister to pay to her the amount of a general legacy, which was given to her by the provisions of the will, in consideration of her forbearing from carrying out an intention to contest the allowance of the will, which she in good faith had entertained, and thus permitting the allowance of the will and the confirmation of the devises therein to the brother and to his son, such a promise is not within the provision of R. L. c. 74, § 1, cl. 1, that without a memorandum in writing no action shall be brought "to charge an executor . . . upon a special promise to answer damages out of his own estate," both because the promise is made by the brother for his own benefit and is an original and not a collateral undertaking on his part and to permit him to avoid his promise to his sister by relying on the statute of frauds would be to permit him to perpetrate a fraud by means of the statute, and also because, all the real estate having been devised specifically and there having been no personal property sufficient to pay the legacy, there was no estate of the testator out of which a general legacy was payable and consequently there was no debt due to the sister from the estate. *Mackin v. Dwyer*, 472.

Suit in equity to enforce rights of plaintiffs in burial lot, which they and their brother, defendant, had purchased and which, without fraud, was conveyed to defendant individually, was defeated because of lack of memorandum such as is required by R. L. c. 74, § 1, cl. 4; c. 147, § 1, see TRUST, 1; EQUITY PLEADING AND PRACTICE, 3.

Suit in equity for specific performance of oral agreement for sale of land, in which it was held, in overruling demurrer to bill, that plaintiff was entitled under contract of sale to conveyance of tract larger than that described in deed to her by defendant if she had taken possession of what she thought was larger tract and description in deed was inserted by fraud of defendant and plaintiff had paid part of purchase price and had so changed her position as to estop defendant from setting up statute of frauds, see EQUITY JURISDICTION, 3, 4.

FUNERAL.

1. Whether a person sitting as a guest in a buggy by the side of one driving across a funeral procession in such a way as wilfully to interrupt and disturb it in violation of R. L. c. 212, § 34, could recover from the employer of the driver of one of the carriages in the procession for injuries caused by the negligence of such driver, here was not considered, because there was no evidence of a violation of the statute. *Hussey v. Franey*, 413.

GIFT.

1. A father made application to an insurance company for insurance on the life of his son, a minor, and the company issued thereon a policy in which no beneficiary was named but the company agreed to pay the amount of the policy "upon receipt of proofs of the death of the insured and upon surrender of the policy and all receipt books." The father paid the premiums upon the policy for several years until the son became of age, whereupon he delivered the policy to his son and thereafter the son paid the premiums until his death. After the son's death his widow, who also was the administratrix of his estate, refused to deliver the policy to the father, and the father by a suit in equity attempted to compel such delivery. Held, that the suit should be dismissed, since the ownership of the policy had passed by a completed gift to the son. *Knowles v. Knowles*, 290.

GUARDIAN.

Ad Litem.

1. It is the duty of a court, in which proceedings are pending, to appoint a guardian *ad litem* whenever a party to the proceedings by reason of minority or mental unsoundness requires such representation, and the court has jurisdiction to consider and decide the question whether such a guardian is required. *Welch v. Fox*, 113.
2. Where a court in which proceedings are pending exercises its jurisdiction by appointing a guardian *ad litem* for one of the litigants, and such appointment is irregular or informal for want of a previous notice to the litigant to appear and show cause why such a guardian should not be appointed or for any other reason, the remedy for the correction of the error is not by a writ of prohibition but by appeal or exception or in some cases by a writ of certiorari. *Ibid.*

HARBOR AND LAND COMMISSIONERS.

1. Under R. L. c. 96, § 3, formerly Pub. Sta. c. 19, § 3, which provides that the board of harbor and land commissioners "may make contracts for the improvement, filling, sale, use or other disposition of the lands at and near South Boston known as the Commonwealth Flats," and that "all conveyances, contracts and leases made under the provisions of this

section shall be subject to the approval of the Governor and Council," such board has the power to make in a deed of a parcel of land included in the Commonwealth Flats covenants of seisin, that the land is free from incumbrances, of right to convey and of warranty. *Cotting v. Commonwealth*, 523.

HIGHWAY.

See WAY.

HOMICIDE.

Pleading.

Indictment.

1. Where there is no statement in an indictment for murder of the time when the crime is alleged to have been committed, but the caption of the indictment states that the indictment was presented by the jurors on the "first Monday of November in the year of our Lord one thousand nine hundred and eight," and a bill of particulars filed by the Commonwealth states that the time it relied on was "between ten o'clock in the evening of September 19 and twelve thirty o'clock in the afternoon of September 20" of a certain year, an exception to and an appeal from the denial of a motion to quash the indictment because in connection with the bill of particulars it did not "plainly and concisely, or sufficiently, describe the" time of the crime, respectively must be overruled and dismissed. *Commonwealth v. Howard*, 128.
2. Where there is no statement in an indictment for murder of the place where the crime is alleged to have been committed, but the caption of the indictment states that the indictment was presented in the county of Bristol, and a bill of particulars filed by the Commonwealth states that the place relied on was "that part of the town of Dartmouth commonly called Padanaram," this court will take judicial notice of the fact that there is only one town called Dartmouth in Bristol County, and an exception to and an appeal from the denial of a motion to quash the indictment because in connection with the bill of particulars it did not "plainly and concisely, or sufficiently, describe the" place where the crime was committed, respectively must be overruled and dismissed. *Ibid.*
3. Each of three counts of an indictment for murder charged an assault and alleged that by reason of the acts described therein the victim instantly died. One count charged that the defendant "with his hands or some instrument to the jurors unknown did choke and strangle" the victim, a woman; another charged that the defendant "did throw and push her into a certain river, by means of which throwing and pushing she . . . was . . . drowned," and the last count charged that the defendant "with his hands or some instrument to the jurors unknown, or by some other means to the jurors unknown, did suffocate" the victim. In response to an order that the Commonwealth file a statement of such particulars as would give to the defendant reasonable knowledge of the means

and manner by and in which it was alleged that the crime was committed, the Commonwealth filed a statement that it was "unable to file as to either of the counts . . . any further particulars which will give the defendant or the court further knowledge of the means and manner whereby the crime was committed." The defendant moved that all the counts be quashed on the ground that they did not, in connection with the bill of particulars, "plainly and concisely, or sufficiently, describe the" act constituting the crime charged or the manner and means by which it was committed. The motion was denied and the defendant excepted and appealed. *Held*, that the exception must be overruled and the appeal dismissed, because each count, taken in connection with the bill of particulars, contained such particularity of allegation as might be of service to the defendant in enabling him to understand the charge and to prepare his defense. *Commonwealth v. Howard*, 128.

Bill of particulars.

4. Three counts in an indictment for murder respectively charged as the means by which the murder was committed that the defendant "with his hands or some instrument to the jurors unknown did choke and strangle" a certain woman, "did throw and push her into a certain river by means of which throwing and pushing she . . . was . . . drowned," and "with his hands or some instrument to the jurors unknown, or by some other means to the jurors unknown, did suffocate her." The defendant moved that the Commonwealth be ordered to file a bill of particulars under each count setting forth in detail the time and place of the alleged crime and "the manner and means by and in which" the crime "is alleged to have been committed." The trial court thereupon ordered that as to each count the Commonwealth file forthwith "a statement of such particulars as shall give to the defendant reasonable knowledge of the time and place of the alleged crime and means and manner by and in which it is alleged" that the crime was committed and "a statement of such particulars as may be necessary to give the defendant and the court reasonable knowledge of the nature and grounds of the crime charged." In response thereto, the Commonwealth filed a statement that the time of the commission of the murder upon which it relied was between 10 P. M. on September 19 and 12.30 P. M. on September 20 of a certain year, that the place was "in or about that part of the town of Dartmouth called Padanaram," but that it was unable to file as to either of the counts of the indictment any further particulars which would "give the defendant or the court further knowledge of the means and manner whereby the crime was committed." The defendant thereupon filed motions that the particulars be adjudged insufficient and the indictment therefore be dismissed, and that each count be quashed and dismissed because of the insufficient bill of particulars. The motions after a hearing were overruled, and the defendant excepted and appealed. *Held*, that the exceptions must be overruled and the appeals dismissed, because the only reasonable interpretation of the record was that the final view of the trial court was either that the particulars furnished were a sufficient compliance with the

court's final order, or that no full compliance was possible and therefore that none was to be required. *Commonwealth v. Howard*, 128.

And such bills, in connection with indictment, were held to furnish sufficient particulars to justify judge in denying motions to quash, *see ante*, 1-3.

What constitutes sufficient Evidence of.

5. An indictment for murder charged in various counts respectively that the alleged crime was accomplished by pushing the victim, a woman, into a river whereby she was drowned, by choking and strangulation, and by suffocation. There was no eyewitness to the crime. The body of the victim was found in a river in two feet of water, with no marks of violence upon it. There was evidence tending to show that the defendant and the victim were in the vicinity of the place where the body was found on the night before it was found, and that previously the defendant had been studying and receiving oral instruction with regard to the production of unconsciousness by compression of the carotid arteries. Medical experts called by the Commonwealth, in answer to hypothetical questions based on the facts in evidence, testified that the cause of the death was strangulation or suffocation. Medical experts for the defendant testified that the cause was drowning. The defendant's contention was that the deceased committed suicide. There was ample evidence of motive for the murder. The trial court refused to rule that on the evidence the verdict should be "not guilty" as to all the counts. *Held*, that the ruling was right, because the evidence was ample to warrant a verdict of guilty on each of the counts. *Commonwealth v. Howard*, 128.

Evidence.

Admissions and confessions.

Refusal of certain ruling as to weight to be given to testimony of witness recounting statement of defendant, which refusal was held to have been correct, *see post*, 17.

Of motive for crime.

6. At the trial of an indictment for murder, where the motive for the commission of the crime relied on by the Commonwealth is the collection by the defendant of the amount named in a policy of insurance upon the life of the deceased, which was held by the defendant as security for a debt owed to him by the deceased, the Commonwealth may show that the defendant understood what a life insurance policy meant, and for that purpose may introduce evidence, which otherwise would be incompetent, that in the year before the alleged murder the defendant had made an application to a beneficiary organization of which he was a member for sick benefits during ten weeks. *Commonwealth v. Rivet*, 464.
7. At the trial of an indictment charging the defendant with the murder of his wife on September 19, 1908, it appeared that no one saw the alleged crime committed. There was evidence tending to show that at the time of the alleged murder the defendant was between twenty-five and thirty years of age; that on October 8, 1907, a second period of enlistment in

the United States army had expired, for three years before which he had been stationed at Fort Rodman in New Bedford and had had very close, even illicit, relations with a girl named G., in whose presence the defendant had shot a man and who had been the only eyewitness of that act; that on October 3, 1907, the defendant went to Tennessee where on October 26, 1907, he married; that soon afterward he re-enlisted and returned to New Bedford, his wife later joining him; that, by agreement between himself and his wife, she was introduced as his sister because they feared that they might arouse the hostility of G. which might result in the defendant's arrest for homicide; that the wife therefore boarded away from the barracks and the defendant lived in the barracks; that subsequently the defendant and his wife quarrelled and she told of his having shot the man in the presence of G., which resulted in the defendant's arrest, trial and discharge in the District Court in July, 1908; that at this time G. learned of the defendant's marriage; that shortly after the trial the defendant was arrested and convicted of non-support of his wife. There was conflicting evidence as to whether the relations between the defendant and his wife were affectionate. Further evidence tended to show that on Saturday, September 19, 1908, the defendant's wife went upstairs to her room early and got into bed, that after a few minutes she rose from the bed, left the house by stealth and, after making a call upon a friend, took a car to Padanaram, a part of the town of Dartmouth a few miles distant, arriving there a little after ten o'clock in the evening. The next day her dead body was discovered floating in water two feet in depth near the bridge at Padanaram, with no mark upon it excepting a slight scratch near one eye; that at the time of her death she was from three and a half to four months advanced in pregnancy. Subject to exceptions by the defendant, the Commonwealth was allowed to introduce testimony of various witnesses as to interviews between the defendant and his wife in July and August, 1908, when he had used vile and abusive epithets toward her; evidence that the defendant had brought to his wife a bottle of laudanum, a bottle of larkspur, and a bottle containing another liquid, saying "I want to get rid of that baby"; testimony of one who stated that the defendant had said to him after the proceedings for non-support that he did not like giving his wife "\$12 out of his pay because he wouldn't have enough money for himself"; testimony of a member of the New Bedford police that he had asked the defendant in the presence of his wife, "if it wouldn't be better for him to give the money to his wife instead of spending it where he was spending it," and that the defendant used vile, abusive and threatening language toward his wife; and letters which passed between S. and the defendant from October 29, 1907, to September 10, 1908, which showed that G. was infatuated with the defendant and was loyal to him even after she learned of his perfidy, which letters the defendant had kept and had not destroyed. *Held*, that the evidence excepted to was none of it too remote and was relevant and material as tending to show the defendant's attitude of mind toward his wife and a motive on his part for desiring to get rid of her. *Commonwealth v. Howard*, 128.

Comment on foregoing evidence in judge's charge, which was held to be proper, see *post*, 19-21.

Of state of mind and habits of deceased.

8. At the trial of an indictment for murder, where the defendant's counsel disclaims having any evidence that the defendant knew of the character of the deceased and also disclaims offering evidence to show that the killing was done in self defense, it is proper to exclude evidence offered by the defendant to show that the habits and character of the deceased were such that he would be likely to have come to his death by having got into a fight when drunk. *Commonwealth v. Rivet*, 464.
9. At the trial of an indictment which charged that the defendant murdered his wife at Padanaram, a part of the town of Dartmouth, there was evidence tending to show that the defendant was seen at Padanaram at a certain time, and that, about five minutes before, the defendant's wife also was seen there, that previous to the time when she was seen at Padanaram the wife had left a house where she was boarding and had called on a friend. Subject to an exception by the defendant, the friend was allowed to testify that the wife on previous occasions had seemed depressed in spirits, but that on the occasion in question she had seemed happier, and that she had stated that she then was on her way to Padanaram to meet her husband to look at a cottage which they could have for the winter. One of the grounds of defense was that the wife committed suicide. *Held*, that the evidence was admissible as tending to show the state of mind of the wife just preceding her death, following *Commonwealth v. Trefethen*, 157 Mass. 180. *Commonwealth v. Howard*, 128.

Opinion : experts.

Refusal of certain ruling as to weight to be given to testimony of medical experts which was held to have been correct, see *post*, 18.

Circumstantial : relevancy and materiality.

10. At the trial of an indictment which charged that the defendant murdered a woman by choking or strangling or suffocating her "with his hands or some instrument to the jurors unknown," it appeared that the body of the woman was found floating in two feet of water, that there were no marks of violence thereon and that no one saw the alleged crime committed. Medical experts for the Commonwealth, in answer to a hypothetical question, which assumed as true the facts placed in evidence by the Commonwealth, stated it as their opinion that the cause of the death was suffocation or strangulation, not drowning. There also was evidence tending to show that the defendant and the woman were both in the vicinity of the place where the body was found late in the evening preceding the time when it was found ; that the defendant had been a private in the United States army for many years, and was illiterate. Subject to an exception by the defendant, the Commonwealth was allowed to introduce in evidence a soldier's handbook which was found among the defendant's effects and contained instructions and diagrams, among others, for the compression of the carotid artery, the pages where such instructions

Homicide (continued).

and diagrams were found being turned down when the book was found. There also was evidence that the defendant had received oral instructions on the same subject and had been warned that if both the carotid arteries were compressed simultaneously, "there is liable to be something happen." *Held*, that the evidence was relevant and material and was admitted rightly. *Commonwealth v. Howard*, 128.

11. At the trial of an indictment for murder, it appeared that the deceased was the wife of the defendant, and that there was no eyewitness to the alleged crime, but that the wife's body was found floating in two feet of water near Padanaram bridge in the town of Dartmouth shortly after noon on a Sunday. A witness for the Commonwealth, who maintained a pavilion near Padanaram bridge, testified that a woman, dressed as was the wife when her body was found, came up the steps of the pavilion shortly before ten o'clock on Saturday night and turned away, and that about five minutes later a man walked up the platform and looked in over the counter, that he saw the same man the following day, that his accurate recollection of first speaking of the occurrence was the following Monday evening, while talking with one S. and two others; that on the following Wednesday or Thursday he identified the defendant, then in custody, as the man whom he had seen on Saturday and Sunday. S. then was called as a witness and testified, subject to an exception by the defendant, that on Sunday afternoon he had seen the defendant come into the pavilion referred to, and that that evening he had had a conversation with the proprietor of the pavilion, the previous witness. He then answered affirmatively the question, "Whether or not the defendant that Sunday evening was the subject matter of conversation between you?" *Held*, that the evidence rightly was admitted. *Ibid*.
12. At the trial of an indictment for murder it appeared that the defendant passed the night of the day when the deceased was killed at the house of the defendant's brother in law, that the next morning as the family were about to sit down to breakfast a neighbor came in and told them that the deceased had been killed and that his body was at the undertaker's, that the brother in law said, "Let us go and see him," and that the brother in law's wife said, "It is better to have breakfast and go to church; it is too late." It also appeared that there was one church service at 8.30 A. M. and another at 10.30 A. M. and that the defendant attended the service at 8.30 A. M. The defendant offered evidence that the seats at the 8.30 service were free while the 10.30 service was "for those who had seats or pews." The evidence was excluded against the exception of the defendant. In answer to an inquiry of the presiding judges the defendant's counsel stated that he did not contend that the fact that the seats were free at the 8.30 service was given by the defendant as a reason why he "did not go with the others to see the body immediately instead of going to church." *Held*, that under the circumstances the evidence was excluded properly as too remote. *Commonwealth v. Rivet*, 464.

Affecting credibility of witness.

13. At the trial of an indictment for murder, a woman, W., testified on behalf of the defendant that at the time of the alleged murder the defend-

ant was with her. Subject to an exception by the defendant, the Commonwealth was allowed to introduce in evidence letters from W. to the defendant which tended to show intimacy and friendly feeling between them. *Held*, that the letters were admissible as tending to show bias of the witness in favor of the defendant. *Commonwealth v. Howard*, 128.

14. At the trial of an indictment for murder, it appeared that after the defendant's arrest he was examined by the chief of police of a certain city, who was a witness for the Commonwealth. The defendant sought to show that a certain woman, whose deposition afterwards was taken at the request of the defendant and was in evidence, came to the chief of police before the trial and told him that she was thinking of leaving the Commonwealth, and that he said that she need not stay, and that he did not communicate her intention to the defendant. The trial court excluded the evidence offered, without prejudice to the right to renew the offer if the evidence should "become competent later," and the defendant excepted. The offer was not renewed. The evidence taken by deposition, in connection with the other evidence in the case, was as favorable to the Commonwealth as to the defendant. *Held*, that the act of the chief of police fell far short of any tendency to show bias, and that the action of the trial court in excluding it was proper. *Ibid*.

To prove *alibi*.

15. At the trial of an indictment for murder, the defendant introduced evidence tending to show that, at the time of the alleged murder, he was with one W., a woman, at a place some distance from the place where the crime was alleged to have been committed, and offered to prove by another witness that he interviewed the witness on the afternoon of the day preceding that of the alleged crime and sought to engage a room at the witness's home for W. The evidence was excluded. *Held*, that it was excluded rightly, since it had no tendency to show that the defendant was not at the place of the alleged crime at the time when it was alleged to have been committed. *Commonwealth v. Howard*, 128.

Conduct of Trial.

Opening statement to jury.

16. In an opening statement to the jury at the trial of an indictment for murder, the district attorney stated, as facts which he expected to prove, matters as to which it was at least doubtful whether they might not be material in certain aspects of the other evidence. After such matters were stated, counsel for the defendant asked that the statement "be struck out as an improper statement, not properly evidence in the case." The trial court stated in the presence and hearing of the jury that the jury and counsel understood that "the opening is not evidence. . . . It is not to affect the jury except as supported by evidence later. If the jury so understand it, I will let it stand." And later in the charge to the jury they were instructed accordingly. *Held*, that there was no error in the action of the court. *Commonwealth v. Howard*, 128.

Homicide (*continued*).

Rulings and instructions.

17. At the trial of an indictment for murder it is proper to refuse to rule as matter of law that "Evidence as to oral statements alleged to have been made by the defendant should be received with caution." *Commonwealth v. Howard*, 128.

18. At the trial of an indictment for murder where the evidence is circumstantial and there is testimony by medical experts, it is proper to refuse to rule as matter of law that "opinion evidence is to be received with caution and where there is an honest difference of opinion among qualified experts the jury ought not to convict." *Ibid*.

Refusal of ruling that on all of evidence verdict of "not guilty" should be given, which was held to be correct, see *ante*, 5.

Judge's charge.

19. At the trial of an indictment for murder the following instructions contained in the charge to the jury on the question of evidence which tended to show a motive for the alleged crime were held to be clear and correct: "Motive is no part of the offense charged, and the Government is not obliged in any case to prove a motive for murder, yet, evidence tending to show a motive is always competent, because if a motive for the crime is clearly shown, it may help to confirm the conclusion reached from all the other evidence, that the accused has committed the offense charged. While motive is not an essential ingredient of the crime of murder and it may be committed without a motive, yet it never can be committed without an intent, and as bearing upon the question of intent, motive or absence of motive may present considerations of the utmost importance. Motive often furnishes corroboration of intent in a case depending upon circumstantial evidence, and as this case depends upon circumstantial evidence, where a motive is shown and clearly established, such evidence of motive is competent for the consideration of the jury in connection with all the evidence in the case as bearing upon the intent with which the crime was committed, and on the other hand, absence of motive even if not conclusive may be considered as bearing upon the question of intent." *Commonwealth v. Howard*, 128.

20. At the trial of an indictment charging the defendant with the murder of a woman who was his wife, there was evidence tending to show that the defendant and his wife had quarrelled, that he was annoyed at the approaching birth of a child and had attempted to induce her to procure an abortion, and that he had used vile epithets and abusive language toward her and had threatened her, and that he had been convicted on a complaint by her charging him with non-support. The following instructions, contained in the charge to the jury as to such evidence, were held to be clear and correct: "There has also been some evidence introduced tending to show that the prisoner had tried to induce his wife to take certain medicines or drugs for the purpose of procuring her miscarriage; and also evidence tending to show that the prisoner had been arrested for failure to support his wife. All the evidence on these various matters is not competent except so far as it bears upon the relations of the prisoner with his

wife, in so far as it tends to show a motive for the offense for which he is now being tried. The jury should not consider any of this evidence as having any bearing upon the case except so far as it may or may not indicate a motive on his part to kill his wife. The fact, if it be a fact, that a person has committed a crime is not evidence that he has committed another crime." *Commonwealth v. Howard*, 128.

21. At the trial of an indictment charging the defendant with the murder of his wife, there was evidence tending to show that before his marriage he had had intimate, even illicit, relations with one G. whom he had deceived as to his marriage, and that he had continued such intimate relations after the marriage; that, after G. discovered how he had deceived her, and after the defendant had quarrelled with his wife, G. still remained faithful to him. Letters between G. and the defendant were introduced in evidence. The following instructions, contained in the charge to the jury on the subject of such letters, were held to be clear, correct and sufficient: "Certain letters claimed to have been written by the prisoner to G., and other letters claimed to have been written by G. to the prisoner have been admitted in evidence. All these letters were admitted solely, so far as they had any bearing upon the relations existing between the prisoner and G., as bearing upon the question whether the prisoner did or did not have any motive for committing the offense charged. These letters should not be considered by the jury for any other purpose." *Ibid.*

HUSBAND AND WIFE.

Action for loss of consortium, see DAMAGES, 3.

History and effect of legislation in this Commonwealth concerning testamentary power of married women, and consent of husband to will of wife, see WILL, 2-4.

Action against husband and wife on contract which jury found husband made in wife's behalf, see CONTRACT, 1; PRACTICE, CIVIL, 1, 2, 17.

Facts held to constitute acquirement of domicile in this Commonwealth by husband and wife so that finding by judge at hearing of libel for divorce that husband and wife never lived together in this Commonwealth within meaning of R. L. c. 152, § 4, was not warranted by law, see DOMICIL, 1, 2.

IMPROVEMENT DISTRICT.

Vote of improvement district to employ person at certain salary as watchman, which was ineffectual because at time vote was passed there was no money in treasury of district, and none was appropriated afterward for payment of watchman's salary, see CONTRACT, 9.

INHERITANCE.

Inheritance tax, see TAX, 1, 2.

See DESCENT AND DISTRIBUTION.

INJURY TO PROPERTY BY PERSONS RIOTOUSLY ASSEMBLED.

See Riot, 1.

INSOLVENCY.

Receivership proceedings in courts of Commonwealth as to insolvent incorporated social club, see EQUITY JURISDICTION, 13-15.

INSURANCE.

Life.

Application.

1. The provision of R. L. c. 118, § 73, that "every policy which contains a reference to the application of the insured . . . must have attached thereto a correct copy of the application, and unless so attached the same shall not be considered a part of the policy or received in evidence," was intended solely to regulate the rights of policy holders and of the insurance companies against each other, and does not apply so as to exclude an application, a correct copy of which has not been attached to the policy issued upon it, where such application is offered in evidence in a suit between persons claiming ownership of the policy and the insurance company is not a party to the suit. *Knowles v. Knowles*, 290.

Change of beneficiary.

2. A policy of life insurance contained the following provision: "This policy is issued with the express understanding that the assured may, with the consent of the society [the insurer] and provided this policy be not then assigned, change the beneficiary or beneficiaries at any time during the continuance of this policy, by filing with the society a written request, duly acknowledged, accompanied by this policy, in which case it is understood that such change will take effect upon the endorsement of the same on this policy by the society." The insured, who was a married woman, caused her husband to be made the beneficiary under the policy. Later she signed and acknowledged an application to the company to make the policy payable to her mother instead of to her husband, but was unable to find the policy, and was told by an agent of the company that the policy must be delivered to the company to complete the change of beneficiary by an indorsement thereon or that a certificate of the loss of the policy must be filed with the company. She said that when she found the policy she would send it to the agent. A few days later a blank for a certificate of loss of policy was mailed to her. The agent kept the application of the insured for a change of beneficiary, and did not present it to the company until after the death of the insured. The insured died more than four months after the making of such application, but never sent to the company either the policy or a certificate of its loss. Shortly before her death she said that she had made out her life insurance to her mother. In

an action to determine whether the husband or the mother of the insured was the beneficiary under the policy at the time of the death of the insured, it was *held*, that the husband was such beneficiary, and that there was no evidence which would warrant a finding that there had been a change of beneficiary from the husband of the insured to her mother. *French v. Provident Savings Life Assurance Society*, 424.

Gift of policy.

Facts which were found to constitute gift by father to son of policy originally taken out by father on life of son, see GIFT, 1.

Fire.

3. One who has been appointed by the authorized agents of a fire insurance company a "subordinate agent" and has received from the insurance commissioner a license, still existing, stating that he has complied with the laws relating to agents of such companies and is authorized to transact within this Commonwealth, for the company in question, "the business of fire insurance" so far as he may be legally empowered to do so by the aforesaid company as its sub-agent, but who has not been authorized by the insurance company nor by its agents who appointed him, nor by any other person acting for the company, to make contracts of insurance or to make indorsements on policies or to assent to removals of property, cannot bind the insurance company by his assent to the removal of certain household furniture covered by a policy issued by the company in the Massachusetts standard form upon such property in a certain building, by receiving such policy from its holder and agreeing to have it changed to cover the property when removed to another building, and his acts and promises in this regard cannot estop the insurance company, when sued upon the policy, from setting up the defense that the insured property when destroyed by fire had been removed from the premises described in the policy without the assent in writing or in print of the company when such removal was not necessary for the preservation of the property from fire. *Pringle v. Spring Garden Ins. Co.* 88.

Marine.

4. In an action by the receiver of the property of a mutual marine insurance company, appointed under St. 1907, c. 576, § 8, to settle its affairs, brought upon a promissory note given by a policy holder for a premium for insurance upon a bark wherever she might go upon a whaling voyage during two years, of which less than one year had expired when the insurance company was enjoined from doing business and the plaintiff was appointed the receiver of its property, the policy provided that the premium should be "sixteen per cent for two years, to return for months not entered upon if no loss is claimed, warranting 12%." The policy contained the following provision: "If on a passage at the expiration of the term, and the company receives on or before that time a written request from the assured (but not otherwise), this insurance shall continue until

Insurance (continued).

noon of the day after arrival at first port of discharge . . . the assured paying pro rata monthly premium for each month entered upon." *Held*, that the provision that the premium should be returned for months not entered upon did not give the policy the character of an open one, under which the insurer could be held only for such risks as subsequently were assumed and indorsed upon the policy, but that here the term of insurance had been entered upon and would continue to run until the termination of the voyage or of the period of two years or until arrival at a port of discharge after an extension of that period by a written request. *Hill v. Baker*, 303.

5. In an action by the receiver of the property of a mutual marine insurance company, appointed under St. 1907, c. 576, § 8, to settle its affairs, brought upon a promissory note given by a policy holder for an insurance premium covering the whole term of the policy, only a portion of which had expired when the insurance company was enjoined from doing business and the plaintiff was appointed the receiver of its property, it appeared that the policy described the insured as a member of the company, and that the company was created by a special charter by which it was authorized to make "insurance against maritime losses on the mutual principle, with all the powers and privileges, and subject to all the duties, liabilities, and restrictions, set forth in the thirty-seventh and forty-fourth chapters of the Revised Statutes, and all subsequent laws in force relating to mutual insurance companies, so far as applicable to" it, that the by-laws of the company provided that all persons who had property insured with it should be members of the company during the period of such insurance and should have votes accordingly, that the by-laws also provided for the division of profits among policy holders upon terminated risks, and that the policy provided that when a loss occurred the amount of any unpaid premium note without discount was to be deducted from the amount which the insured was entitled to receive. *Held*, that under the general rule applying to mutual insurance companies there was no liability on the part of the company for failing to continue the performance of its agreement when such performance had been made impossible by the action of the Commonwealth under existing laws, and that the premium for which the note was given was due absolutely upon the issuing of the policy and with other like premiums constituted a fund for the payment of losses, so that the plaintiff was entitled to recover the amount of the note in full. *Ibid*.
6. In an action by the receiver of the property of a mutual marine insurance company, appointed under St. 1907, c. 576, § 8, to settle its affairs, brought upon a promissory note given by a policy holder for an insurance premium covering the whole term of the policy, only a portion of which had expired when the insurance company was enjoined from doing business and the plaintiff was appointed the receiver of its property, it appeared that the plaintiff was appointed temporary receiver on March 19 of a certain year and was made permanent receiver on March 27 of the same year, that on March 14 of the same year the defendant sent his policy to the company for cancellation, and that on March 16 the president of the company wrote in reply that the policy was cancelled as requested. There was no int-

mation that this was not done in good faith on both sides in ignorance of the insolvency of the company, and the facts were such that this ignorance was possible even in case of the president of the company. The date of the filing of the bill on which the receivership was granted did not appear. *Held*, that the court must take the date of the appointment of the receiver as fixing the rights of the parties, and must treat the policy as having been cancelled when the president sent his letter saying that it was cancelled, and accordingly that the defendant was entitled to have a proper deduction made from the amount of the note for the period after March 16 when the surrender of his policy had been accepted. *Hill v. Baker*, 303.

Mutual.

Principles governing mutual insurance companies applied to mutual marine insurance company, *see ante*, 5.

INTEREST.

What interest plaintiff in action upon replevin bond is entitled to, *see REPLEVIN*, 1, 2, 5.

INTERSTATE COMMERCE.

1. The provision contained in § 20 of 24 U. S. Sts. at Large, c. 104, called the interstate commerce act, as amended by 84 U. S. Sts. at Large, c. 3591, § 7, that "no contract, receipt, rule, or regulation shall exempt" a common carrier receiving property for transportation from a point in one State to a point in another State from any liability imposed by the act, does not invalidate nor apply to an agreement contained in a receipt given in good faith by an express company to a shipper of goods and accepted by him with a complete understanding of its provisions, by which it is stipulated that unless a greater value is declared and is stated in the receipt the value of the goods shall be taken to be \$50. *Bernard v. Adams Express Co.* 254.

INTOXICATING LIQUORS.

Sale.

1. At the trial of a criminal complaint which charged the defendant with maintaining a nuisance in using a tenement for the illegal sale and keeping for sale of intoxicating liquors, there was evidence which tended to show that as a part at least of his regular business of manufacturing cider the defendant had made in his mill sales of cider in small quantities of less than a gallon and of more than the strength prohibited by R. L. c. 100, § 1; St. 1903, c. 460, § 1. *Held*, that a verdict of guilty was warranted. *Commonwealth v. Greenwood*, 124.
2. The words "sales of cider at wholesale," as used in R. L. c. 100, § 1, as amended by St. 1903, c. 460, § 1, which exempt from the provisions of the statute prohibiting certain sales of spirituous or intoxicating liquors

Intoxicating Liquors (*continued*).

"sales of cider at wholesale by the original makers thereof," in the absence of a special definition of its meaning by the Legislature, must be construed, as directed by R. L. c. 8, § 4, cl. 3, according to the common and approved usage of the language, and therefore must mean sales made in large quantities as distinguished from those made in small quantities, which are to be regarded as sales at retail; and therefore it is error for a judge presiding at the trial of a criminal complaint, where the defendant is charged with selling cider illegally and contends that his sales were not illegal because they were made at wholesale, to instruct the jury that a sale made to a purchaser for his own consumption and not to sell again is a sale at retail, whether it is made in quantity of one gallon or more, and that a sale at wholesale is a sale made to one who has the real or at least the apparent purpose to sell again to his customers. In such a case the jury should be instructed that, in determining the question of fact whether the sales made by the defendant were sales at wholesale, besides considering all the evidence with regard to individual sales testified to by the witnesses, they should bear in mind that sales at retail are sales made in small quantities such as are adapted to the wants of individual purchasers, while sales at wholesale are sales made in large quantities, such as commonly would be beyond the needs or desires of ordinary customers. *Commonwealth v. Greenwood*, 124.

Transportation.

3. *It seems*, that in St. 1906, c. 421, § 1, which provides that "No person or corporation, except a railroad or street railway corporation, shall, for hire or reward, transport spirituous or intoxicating liquors into or in a city or town in which licenses of the first five classes for the sale of intoxicating liquors are not granted, without first being granted a permit so to do" as thereafter provided, there is nothing which forbids a liquor dealer licensed and doing business in a city where licenses of all classes are granted from delivering, without any charge for transportation, to his customers in another city or town in which licenses of the first five classes are not granted the goods which he lawfully has sold to them, if he does this in good faith without receiving directly or indirectly in the price of the goods any hire or reward for their carriage, and, if he is prosecuted for an alleged violation of the statute, it is a question for the jury whether he has received in the price of the liquor sold any hire or reward for its carriage. *Commonwealth v. Radocchia*, 455.
4. St. 1906, c. 421, § 1, provides as follows: "No person or corporation, except a railroad or street railway corporation, shall, for hire or reward, transport spirituous or intoxicating liquors into or in a city or town in which licenses of the first five classes for the sale of intoxicating liquors are not granted, without first being granted a permit so to do as hereinafter provided." At the trial of a complaint under this statute it appeared that the defendant was the servant of a licensed liquor dealer in a city where licenses of all classes were granted and was transporting intoxicating liquor for delivery in a city where licenses of the first five classes were not granted, and that the defendant did not have a permit

granted under the statute. It further appeared that the defendant's employer agreed to deliver all goods free of charge in the city where the defendant was making the delivery, that the tag on the package containing the liquor was marked "Paid" with the purchaser's name and that at the top was written "No charge made for delivery." The defendant received regular wages for performing all his duties, which included the delivery of intoxicating liquors in the city where this delivery was being made and also included work about his employer's place of business in the city where licenses of all classes were granted and the delivery of intoxicating liquors in various parts of that city. *Held*, that the wages paid to the defendant for all the services rendered by him to his employer could not be said as matter of law to be a hire or reward for the carriage of the liquors into the city where licenses of the first five classes were not granted merely because those services incidentally included the transportation and delivery of liquors to their purchasers in such city, and that the question whether the defendant had violated the statute was for the jury. What rule would be applied in a case where it appeared that the servant was hired or paid exclusively or even principally for the purpose of making such deliveries was not considered. *Commonwealth v. Radocchia*, 455.

INVITED PERSON.

Who is invited person, see NEGLIGENCE, 54, 55.

JOINT TORTFEASORS.

1. Wrongdoers acting independently, whose tortious acts or omissions concurrently contribute to the injury of a person, are liable to such person jointly. *Bagley v. Wonderland Co.* 238.

JUDGMENT.

As to entry of judgment after sustaining of exceptions, see PRACTICE, CIVIL, 18-20.

JURISDICTION.

1. It is a well established rule that where a remedy is created by statute the time within which it must be pursued is one of the prescribed conditions under which it can be availed of, and the court in which such remedy is sought has no jurisdiction to entertain proceedings for relief begun at a later time. *Cheney v. Assessors of Dover*, 501.

Jurisdiction of court to appoint guardian *ad litem* whenever party to proceedings before it requires such representation, see GUARDIAN, 1, 2.

LAND COURT.

Exceptions.

1. Where, on an appeal to the Superior Court from a decree of the Land Court under St. 1904, c. 448, § 8, the appellant presents issues of fact for

Land Court (*continued*).

trial before a jury in the Superior Court, and the judge of the Land Court certifies that the issues presented are framed in the form requested, but that they are disallowed by him as presenting only questions of law, and the appellant alleges exceptions to the order disallowing the issues, upon a subsequent decision by this court sustaining the exceptions on the ground that the order of the judge disallowing the issues was erroneous, the appellant does not lose his right of appeal to the Superior Court because the prosecution of his exceptions has extended the time of the final certification of the issues beyond thirty days from the date of the order appealed from, as limited by § 8, and the issues are to be remanded to the Land Court for certification and transmission to the Superior Court as they were framed and certified, and as of the date of that certification, with the certificate of the erroneous disallowance omitted. *Weeks v. Brooks*, 458.

Appeal.

Report by judge to Superior Court.

2. Under St. 1905, c. 288, which requires a judge of the Land Court, where an appeal is taken from that court to the Superior Court, to file in the Superior Court "a full report of his decision and of the facts found by him so far as they relate to or bear upon any questions involved in the appeal," the judge is not obliged to make specific findings upon issues framed for the Superior Court, because such issues are framed after the findings are made. *Old Colony Street Railway v. Thomas*, 529.
3. A report filed by a judge of the Land Court, on an appeal by a respondent from a decree granting a petition for the registration of the title to certain flats, stated: "From a study of the report of the official examiner . . . I found good record title in the petitioner. . . . The matter set forth in the issues on this appeal was not presented before me otherwise than as it might appear from the deeds in the chain of the petitioner's record title and from the answers filed by the respondent. As to the latter, the case had been specially assigned for trial and the respondent had defaulted. As to the former, I found, from an examination of the records submitted to me, title in the petitioner as above stated." *Held*, that, under the circumstances of the default of the respondent, the report was sufficient under St. 1905, c. 288, which required of the judge "a full report of his decision and of the facts found by him so far as they relate to or bear upon any questions involved in the appeal." *Ibid*.

Filing of appeal papers.

4. Where one, who has claimed an appeal to the Superior Court from a decree of a judge of the Land Court, after the office hours of the clerk of the Superior Court on the thirtieth day after the date of such decree, leaves with an assistant clerk of the court at his house and not at the clerk's office the papers which, by R. L. c. 128, § 18, he should file within thirty days after the date of the decree, and on the next day the assistant clerk takes the papers to the office of the clerk and enters them there, dating the entry on the docket as of the day on which he received them at his house, there is no entry of the appeal in the Superior Court within thirty days after the

decree, and therefore the record made by the assistant clerk should be amended and the appeal should be dismissed. *Old Colony Street Railway v. Thomas*, 529.

Determination of materiality of issues.

5. The official act of a judge of the Land Court in framing issues for the Superior Court upon an appeal to that court for a jury trial on the facts, establishes *prima facie* the proposition that such issues are pertinent and ought to be tried. *Old Colony Street Railway v. Thomas*, 529.
6. In determining whether issues, which were framed by a judge of the Land Court upon an appeal, by the respondent in a petition for the registration of the title to certain land, to the Superior Court for a jury trial on the facts, are material to the case, or whether an exception by the respondent to an order of the Superior Court allowing a motion of the petitioner that the appeal be dismissed because the issues were not material should be sustained, this court cannot consider matters in a decision and report made by the judge of the Land Court in granting another petition by the same petitioner for the registration of land contiguous to that described in the first petition, although such decision and report are a part of the same bill of exceptions in this court. *Ibid.*

Effect of disallowance of issues, and of exceptions thereto.

7. Upon a petition in the Land Court for registration of title, after a decree for the petitioner has been entered in that court and the respondent has claimed an appeal to the Superior Court under St. 1904, c. 448, § 8, if the issues presented by the respondent for trial in the Superior Court are disallowed by the judge of the Land Court, the appeal has not been perfected and the Superior Court has not acquired jurisdiction, so that a motion in the Superior Court for the framing of issues must be denied and a motion in that court to dismiss the appeal must be granted. *Weeks v. Brooks*, 458.
8. If, at the trial in the Land Court of a petition for registration of the title to certain land, the boundaries of the land as described in the deeds conveying it cannot be ascertained without extrinsic evidence both documentary and oral, and the petitioner puts in such extrinsic evidence in support of his contention, the respondent by leaving this evidence uncontradicted does not lose his right to have the issues of fact presented to a jury, and, if upon the evidence of the petitioner the trial judge gives a judgment for the petitioner, from which the respondent appeals to the Superior Court and presents issues relating to the boundaries for trial before a jury in the Superior Court, and the judge of the Land Court disallows the issues on the ground that no questions of fact are involved, the respondent is aggrieved by such ruling and decision, which violate his constitutional right to have the issues of fact submitted to a jury, and exceptions alleged by him will be sustained *Ibid.*

Principle which governs foregoing decision, see CONSTITUTIONAL LAW, 2.

Time for filing.

Time for filing appeal in Superior Court is extended until thirty days after favorable determination of exception to such ruling by judge of Land Court, see *ante*, 1.

LANDLORD AND TENANT.

Tenant's Liability for Rent.

1. The declaration in an action of contract alleged that one F. leased certain premises to the defendant, who covenanted in the lease with F. and his assigns to pay a certain rent monthly; that F. conveyed the premises to the plaintiff by a deed, a copy of which was annexed to the declaration and in which F. assigned his rights under the defendant's lease to the plaintiff; and that the defendant had failed to pay certain portions of the rent. At the trial, the plaintiff was the only witness and testified, among other things, without objection that he was the owner of the premises, that after he purchased them he collected rent from the defendant under the lease and that the defendant continued to occupy the premises until a day in May when he vacated them and had paid no rent since. The deed containing the assignment by F. to the plaintiff was not introduced in evidence. *Held*, that there was evidence which warranted a finding that the plaintiff was the owner of the reversion of the premises; and that as owner of the reversion he could maintain an action in his own name for the rent due under the lease. *Maden v. Woodman*, 4.

LAND REGISTRATION.

See LAND COURT.

LEGACY.

See DEVISE AND LEGACY.

LIEN.

Mechanic's lien, see that title.

LIMITATIONS, STATUTE OF.

- Fact that action upon note secured by mortgage is barred by statute of limitations does not affect validity of mortgage, see MORTGAGE, 1.
- Provisions of R. L. c. 182, § 15, regarding discharge of mortgages under certain circumstances, constitute statute of limitations and are not unconstitutional as impairing obligation of contracts when applied to mortgages, time limited for performance of which expired more than twenty years before date when statute was enacted, see MORTGAGE, 2, 3.
- Statute, which attempted to extend time within which land could be redeemed from tax sales already made under R. L. c. 13, §§ 58, 75, would be unconstitutional, see CONSTITUTIONAL LAW, 1.
- Consequent construction of St. 1905, c. 325, § 3, amending R. L. c. 13, § 75, so that it applied only to sales made after its passage, see EQUITY JURISDICTION, 5.

MANDAMUS.

1. Where a petition for a writ of mandamus comes before a single justice of this court, who after a hearing orders that the writ should issue, but at the request of the respondents reports the case for decision by the full court, the report brings before this court only questions of law, and the decision of the single justice must be given effect unless some error of law appears, the proceeding being one at law and not in equity. *Andrews v. Mines Corporation*, 121.

Petition for writ of mandamus was held to be proper remedy to enforce right of stockholder in certain foreign corporation to inspect its books and records for good reasons and under proper conditions, see CORPORATION, 3.

MARRIAGE AND DIVORCE.

Facts held to constitute acquirement of domicile in this Commonwealth by husband and wife so that finding of judge at hearing of libel for divorce that husband and wife never had lived together in this Commonwealth within meaning of R. L. c. 152, § 4, was not warranted by law, see DOMICIL, 1, 2.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See AGENCY.

MECHANIC'S LIEN.

1. The inversion, in the caption of the statement of account included in the certificate filed by a lienor under R. L. c. 197, § 6, to preserve a mechanic's lien, of the names of the lienor and of the contractor, which is an obvious error in the manner of stating the account, does not affect the validity of the lien. *De Vingo v. Hall*, 407.
2. Where three persons, each of whom has a lien under R. L. c. 197, § 1, upon certain real estate for labor performed in the erection of a building thereon, file in the registry of deeds for the county where the real estate is situated within the time allowed by § 6 of that chapter a certificate containing a description of the real estate upon which the liens are claimed, the opening statement of which is "We hereby certify that the following is a just and true account, with all just credits given of the amount due us for labor performed in the erection of a building" upon the lot described, followed under the word "Account" by three separate statements of the labor performed by each of the lienors, which certificate is signed and sworn to by an attorney in behalf of all of the lienors, the liens are preserved and the three lienors may maintain a joint petition to enforce them under § 11 of the same chapter. *Ibid.*

MILK.

1. The provisions of R. L. c. 56, §§ 56, 57, making it a crime to sell or have in possession with intent to sell milk which is not of good standard quality, as amended by St. 1908, c. 643, which provides that "milk which, upon analysis, is shown to contain less than twelve and fifteen hundredths per cent of milk solids or less than three and thirty-five hundredths per cent of fat, shall not be considered of good standard quality," are constitutional. *Commonwealth v. Wheeler*, 384.
2. In a prosecution under R. L. c. 56, §§ 56, 57, as amended by St. 1908, c. 643, for having in possession with intent to sell milk which contained eleven and sixty-five hundredths per cent of milk solids and no more, evidence offered, to show that the defendant did not know and had no reason to know that the milk in his possession contained less than the prescribed quantity of milk solids, is immaterial. *Ibid.*
3. In a prosecution under R. L. c. 56, §§ 56, 57, as amended by St. 1908, c. 643, for having in possession with intent to sell milk which contained eleven and sixty-five hundredths per cent of milk solids and no more, evidence offered, to show that the milk in the defendant's possession was not deleterious or injurious to health and that it was nutritious and beneficial as an article of food, is immaterial. *Ibid.*
4. In a prosecution under R. L. c. 56, §§ 56, 57, as amended by St. 1908, c. 643, for having in possession with intent to sell milk which contained eleven and sixty-five hundredths per cent of milk solids and no more, evidence offered, to show that the milk in the possession of the defendant was without adulteration and just as it came from properly fed cows in sound health, is immaterial. *Ibid.*

MISTAKE.

Application of principle that, where one knows all facts regarding certain matter, mistake in understanding significance of facts does not affect validity of contract made in face of them, see CONTRACT, 10.

MONEY.

Tort in nature of trover will lie for conversion of money, see CONVERSION, 1.

MORTGAGE.

Of Personal Property.

Action by mortgagee of personal property against officer attaching it, involving determination of validity of certain notices given by mortgagee to officer and propriety of acts of officer in premises, see ATTACHMENT, 1.

*Of Real Estate.***Consideration.**

Defense of no consideration in action by payee of mortgage note against indorser before delivery, see **BILLS AND NOTES**, 1-3.

Statute of limitations.

Fact that action upon note secured by mortgage is barred by statute of limitations does not affect validity of mortgage, see *post*, 1.

Adverse possession.

Where mortgage purports to convey to mortgagee fee in land, but only title which mortgagor has to convey is remainder after life estate of father, and after conveyance mortgagor continues to live on estate with father for more than twenty years after mortgage note matures, such sharing possession with father is not adverse possession as to mortgagee, see *post*, 5.

Validity.

1. The fact that an action upon a note secured by a mortgage is barred by the statute of limitations does not affect the validity of the mortgage securing the payment of the note. *Jenkins v. Andover Theological Seminary*, 376.

Discharge.

2. A portion of R. L. c. 182, § 15, which originally was St. 1882, c. 237, provides that when the record title of land is encumbered by an undischarged mortgage, and the mortgagor and those having his estate therein have been in uninterrupted possession of the land for twenty years after the expiration of the time limited in the mortgage for the full performance of the condition thereof, he or they may apply to the court by petition setting forth the facts, and if, after such notice by publication or otherwise as the court orders, no evidence is offered of a payment on account of the debt secured by such mortgage within twenty years after the expiration of the time limited for the performance thereof or of any other act in recognition of its existence as a valid mortgage, the court may enter a decree reciting the facts and findings, which shall be recorded in the registry of deeds for the county or district in which the land lies, and no action to enforce a title under the mortgage shall thereafter be maintained. *Held*, that this provision is a statute of limitation, which merely affects the remedy and does not change the substantive rights secured by the contract of mortgage, and applies to a mortgage where the time limited for the performance of the condition of the mortgage expired more than twenty years before the year 1882 when the statute was enacted. *Held, also*, that, so construed, the statute is not unconstitutional as impairing the obligation of contracts. *Lewis v. Crowell*, 497.
3. Upon a petition under R. L. c. 182, § 15, St. 1882, c. 237, to remove a cloud from the title to the petitioner's land by declaring the discharge of a mortgage on the land, which had been in the uninterrupted possession of the mortgagor and those holding under him for more than twenty years after the expiration of the time limited for the full performance of the condition of the mortgage, if after the notice required by the statute no

evidence is offered of a payment on account of the debt secured by such mortgage within twenty years of the time limited for the performance thereof or of any other act within that period in recognition of its existence as a valid mortgage, the respondent cannot be allowed to show that the condition of the mortgage has not been performed; and, if it appears and is found as a fact that the condition of the mortgage has not been performed, the petitioner none the less is entitled to a decree, because possession by the mortgagor for twenty years without recognition of the mortgage, when the terms of the statute are complied with, is made an absolute bar to all claims under the mortgage. *Lewis v. Crowell*, 497.

4. A portion of R. L. c. 182, § 15, which originally was St. 1882, c. 237, provides that when the record title of land is encumbered by an undischarged mortgage, and the mortgagor and those having his estate therein have been in uninterrupted possession of the land for twenty years after the expiration of the time limited in the mortgage for the full performance of the condition thereof, he or they may apply to the court by petition setting forth the facts, and if, after such notice by publication or otherwise as the court orders, no evidence is offered of a payment on account of the debt secured by such mortgage within twenty years after the expiration of the time limited for the performance thereof or of any other act in recognition of its existence as a valid mortgage, the court may enter a decree reciting the facts and findings, which shall be recorded in the registry of deeds for the county or district in which the land lies, and no action to enforce a title under the mortgage shall thereafter be maintained. Upon a petition in the Land Court under this statute the petitioner introduced evidence tending to prove the averments of his petition, and the respondent introduced evidence tending to show that a payment was made on account of the mortgage less than twenty years before the filing of the petition, and introduced other evidence tending to show that the mortgage had been recognized by the mortgagor as valid within twenty years. The judge dismissed the petition, and ruled that upon the introduction of this evidence by the respondent the court had no authority to enter a decree for the petitioner under the statute. *Held*, that the petition was dismissed rightly, and that the ruling of the judge was correct, the court having no jurisdiction to make a decree where evidence is offered of a payment on the mortgage or of a recognition of it within twenty years. *McMahan v. McMahan*, 99.
5. If a man makes a mortgage of a farm, purporting to convey the whole title, whereas his interest in it is a remainder after the death of his father who holds it as tenant by the curtesy, and if after the making of the mortgage the mortgagor continues to live upon the mortgaged property operating the farm in connection with his father until a period of more than twenty years has elapsed after the maturity of the mortgage note, during which no payment of principal or interest has been made upon the mortgage and no acknowledgment of the mortgage or promise to pay has been made, such sharing by the mortgagor in the occupation by his father is not possession of the property by the mortgagor, and cannot be relied upon to establish a title in him at common law by adverse possession

against the mortgagee, nor can it be made the basis of proceedings under R. L. c. 182, § 15, to have the mortgage declared to be discharged. *Jenkins v. Andover Theological Seminary*, 376.

6. In a suit in equity against the assignee of a mortgage on the plaintiff's land seeking the cancellation and discharge of the mortgage, which had been given to secure a witnessed note, which was payable more than twenty years before the filing of the bill and on which no payment of principal or interest had been made during that time, the plaintiff contended that it must be presumed that the note had been paid. It appeared that, when the plaintiff gave the mortgage, his interest in the land was that of a remainderman, subject to a life estate in his father who was a tenant by the curtesy, and that the plaintiff after giving the mortgage lived with his father upon the land until the death of his father, which occurred less than three years before the filing of the bill, and that thereafter the plaintiff occupied the land as his own, that ever since the making of the mortgage the mortgage and the note were and continued to be in the custody of the mortgagee or of the defendant as his assignee, that the mortgagee and the defendant frequently wrote to the plaintiff and received no answer, and that they had refrained from taking steps to foreclose the mortgage because they were informed by counsel that they could do nothing until the death of the life tenant, that upon the death of the plaintiff's father they demanded payment from the plaintiff, who made no pretense that the note had been paid, although he refrained from making any promise or any express recognition of the validity of the mortgage, and spoke of his hard luck and his poverty, that the plaintiff was present at the trial and did not take the stand to testify, and it did not appear by the record that he ever had said that the note was paid. *Held*, that, giving due weight to the presumption of payment arising from the lapse of time, the evidence showed so strongly that the note had not been paid, that a finding of a trial judge to the contrary would be reversed as clearly wrong; and that, the note not having been paid, the mortgage stood as security for the debt. *Ibid*.

Foreclosure.

Rights of creditor, who has attached real estate subject to mortgage, as to surplus remaining after foreclosure of mortgage by sale, see EQUITY JURISDICTION, 10.

MUNICIPAL CORPORATIONS.

By-laws and Ordinances.

Interpretation of certain provisions of certain joint rules and orders of city council of Cambridge bearing on validity of election of city solicitor by city council, see CAMBRIDGE, 2-4.

Officers and Agents.

Because workmen for town who negligently left barrier in highway were town's agents, no further notice to town of defect was necessary, see WAY, 1, 2.

Municipal Corporations (continued).

City is not liable to person assaulted and robbed by police officers appointed by it, nor in action of tort to one compelled to pay taxes which were excessive by reason of assessment fraudulently made by its assessors, see PUBLIC OFFICERS, 1, 2.

Statement and application of principle that county commissioners, in employing architect to draw plans for construction or alteration of county buildings, act as statutory officers and have only power conferred upon them by Legislature, see COUNTY COMMISSIONERS, 1-7, 9.

Negligence of county commissioners, which was held to have occurred while they were acting as public officers, and for which therefore county was not liable, see COUNTY COMMISSIONERS, 8.

Various questions which arose as to validity of election of city solicitor of Cambridge and were determined in mandamus proceedings, see CAMBRIDGE, 1-4.

Vote of watch, fire or improvement district to employ person at certain salary as watchman, which was ineffectual because at time vote was passed there was no money in treasury of district, and none was appropriated afterward for payment of watchman's salary, see CONTRACT, 9.

MUNICIPAL COURTS.

See POLICE, DISTRICT AND MUNICIPAL COURTS.

MURDER.

See HOMICIDE.

NAME.

Valid use, by one contracting in writing with city and making assignment of contract, of name other than his own, see ASSIGNMENT, 2.

NEGLIGENCE.

Due Care of Plaintiff.

Where plaintiff was employee.

Of employee using defective pneumatic hammer, see *post*, 21.

Of boy sixteen years of age injured while operating wire cutting press, see *post*, 23.

Of foreman plumber entering dark pump house and slipping on oily floor, see *post*, 16.

Of night conductor in freight yard of railroad company under certain circumstances, see *post*, 8, 9.

Where plaintiff was traveller on highway.

Of one riding on bicycle into barrier negligently left in way by employees of city who had been using steam roller, see *post*, 57.

- Of one riding as guest of driver of express wagon and relying on driver, who might have been found to be negligent, *see post*, 61.
- Of person driving across street railway track and knowing that car was approaching from rear, *see post*, 32.
- Of person driving heavy wagon on street car tracks where rest of street is icy and difficult to travel, *see post*, 80, 59.
- Of person run into from behind by street car as he was driving on street railway track in order to pass wagon in front of him, *see post*, 31.
- Of one driving covered delivery wagon from intersecting driveway into street where street railway tracks were, *see post*, 29.
- Of boy who, while he was driving grocery wagon in street and just after he had turned in seat to fix baskets behind him, was struck by wire of telephone company hanging across street, *see post*, 58.
- Where plaintiff was entering car, or was passenger.
- Of person attempting to enter partly opened door of semi-convertible street railway car, *see post*, 41.
- Of person attempting to enter street railway car on street from wrong side of car, *see post*, 34.
- Of person falling into space between car of elevated railway train and platform, as she was entering train, *see post*, 51.
- Of person waiting at elevated station of elevated railway company, who, to get upon approaching surface car before others, leaves lighted passenger platform and walks out upon unlighted platform intended only for use of employees, *see post*, 55.
- Of passenger in street car, who, feeling heat around ankles and seeing flames, jumped up suddenly and wrenched side, *see post*, 48; CARRIER, 1.

Due Care of Plaintiff's Servant.

- Whether servant of plaintiff, who was driving plaintiff's wagon on track of street railway, was negligent, was held to be question for jury, *see post*, 60.

Due Care of Plaintiff's Decedent.

- Whether person riding on front platform of street railway car knew of notice that one did so at his own risk, was held immaterial in action against street railway company for such person's death, since he was passenger, and whether or not he was in exercise of due care did not affect statutory liability of defendant, *see post*, 45, 46.

Imputed.

- Negligence of driver of express team run into by street car was held not to be imputed to guest on seat with him, *see post*, 61.
- If driver of automobile in running into open trench in highway in city is negligent and his negligence contributes to cause accident and person in automobile is injured, such person cannot recover against city irrespective of whether or not negligence of driver is to be imputed to him, *see* WAY, 4.

Invited Person.

One waiting at station of elevated railway, who, in order to get upon approaching surface street car before others, walks away from lighted platform upon narrow unlighted way intended only for use of employees and is injured, cannot be said to have been invited by elevated railway company so to do, and is not licensee, but is trespasser, see *post*, 54, 55.

Licensee.

One waiting at station of elevated railway, who, in order to get upon approaching surface street car before others, walks away from lighted platform upon narrow unlighted way intended only for use of employees and is injured, cannot be said to have been invited by elevated railway company so to do, and is not licensee, but is trespasser, see *post*, 54, 55.

Trespasser.

One waiting at station of elevated railway, who, in order to get upon approaching surface street car before others, walks away from lighted platform upon narrow unlighted way intended only for use of employees and is injured, cannot be said to have been invited by elevated railway company so to do, and is not licensee, but is trespasser, see *post*, 54, 55.

Woman attempting to enter street railway car on wrong side was held, in action against street railway company for injuries resulting from conductor's starting car while she was so doing, not to be trespasser as matter of law under circumstances, see *post*, 33.

But, in same case, jury should have been instructed that, if they found that plaintiff in so entering car was acting unlawfully, she must show that her injury was caused by wilful misconduct or wanton and reckless conduct on part of conductor in order to recover, see NEGLIGENCE, 36-38.

*Employer's Liability.**Pleading.*

Counts in declaration in action by employee against employer to recover for personal injuries, alleging defect in machine, were held not to be inconsistent with count alleging negligent failure of defendant to notify plaintiff of danger incidental to use of defective machine, see PLEADING, CIVIL, 1.

Assumption of risk by employee.

1. A workman can be barred on the ground of assumption of risk from recovery against his employer for injuries resulting from perils which have been created since the making of his contract of employment only when he voluntarily has continued in the service after appreciating the nature and extent of the added exposure to danger. *Bagley v. Wonderland Co.* 238.

Application of above principle to case of foreman plumber who entered dark pump house in course of employment and slipped on oil on floor, see *post*, 16.

Assumption of risk by employee in using defective pneumatic hammer, see *post*, 21.

By employee in box factory of danger from portion of circular saw which was under cutting table, see *post*, 14.

Of obvious risk of injury due to exposed circular saw in factory, see *post*, 12.

Application, in action by employee against employer for injuries caused by defective wire cutting machine, of principle that, in order for it to be ruled as matter of law that employee assumed risk of danger, appreciation as well as knowledge of danger must be shown, see *post*, 23.

Employee mentally deficient.

2. Where an employer has no notice or reasonable ground for apprehension that an employee is afflicted with a mental deficiency, he is justified in assuming that the employee is of ordinary intelligence and needs only the warnings and instructions which a workman of ordinary intelligence would require. *Cote v. D. W. Pingree Co.* 286.

Fellow servant.

3. One, who had been set at work by his employer at stripping the lead covering from certain wire cables used for conducting electricity and who knew of the risk of working upon or near to such cables when they are heavily charged, so that there was no duty on the part of the employer to warn him as to the danger attending the work, cannot maintain an action against his employer at common law, whatever his rights may be under St. 1909, c. 514, § 127, cl. 2, for injuries sustained by him because of the negligence of a foreman under whom he worked in assuring him that the work could be done safely and in telling him that the electricity had been shut off from the cables and in ordering him to use an improper tool for the work, such foreman being his fellow servant. *Grebenstein v. Stone & Webster Engineering Corp.* 431.

4. In an action by a workman against his employer for personal injuries sustained by the plaintiff from being struck by a car which was run upon a track laid on a trestle and was used to bring the product of the defendant from the defendant's factory to its warehouse, if it appears from the plaintiff's evidence that the accident was caused by the negligence of a fellow servant of the plaintiff in starting the car before the signal for starting it had been given, and there is no evidence of a failure of the defendant to instruct this servant fully as to his duties or that the servant failed to comprehend the instructions given to him or that he was incompetent to do the work assigned to him, and if also there is no evidence that any negligence of the servant was known to the defendant or to its superintendent and no evidence of any negligence in continuing to employ him, a verdict must be ordered for the defendant. *Iwanowski v. American Agricultural Chemical Co.* 816.

Act of fellow servant of plaintiff, in action against employer for injuries caused by starting of machine, in attempting, with plaintiff, to start machine which injured plaintiff, does not bar recovery by plaintiff if there is evidence that machine was started automatically because of defect in it, see *post*, 26.

Superintendence.

5. In an action under the employers' liability act for injuries received while in the employ of the defendant, from being struck by a plank, which had been held in place by a wire against a concrete wall in process of hardening and which fell upon the plaintiff when the wire was cut by a person alleged to be a superintendent of the defendant without giving the plaintiff any warning that the plank was about to fall, the defendant contended that there was no evidence warranting a finding that the person who cut the wire was entrusted by the defendant with superintendence within the meaning of the statute. This person was referred to in the testimony as the "boss carpenter," by witnesses who also from their daily observation of him described his principal work in the common employment as giving orders to the men. His wages were twenty cents per day more than those paid his fellows. He testified that his principal work was to tell the men under him, numbering ten or fifteen or more, what to do; that he could change their work; that when he was not satisfied with a man he could send him elsewhere; that he did not labor at carpentering or only a very little, and that he "was not supposed to do any work"; that his larger pay "was for bossing the men, looking after them that they done the work right, tell them what to do," that he did not hire or discharge men, but told another person who discharged men on his request. *Held*, that this evidence was sufficient to support a finding that the person in question was a superintendent, "whose sole or principal duty was that of superintendence" within the meaning of the statute. *Mooney v. Benjamin F. Smith Co.* 270.
6. In an action under the employers' liability act for injuries received while in the employ of the defendant, from being struck by a plank, which had been held in place by a wire against a concrete wall in process of hardening and which fell upon the plaintiff when the wire was cut by a superintendent of the defendant without giving the plaintiff any warning that the plank was about to fall, there was evidence warranting a finding that the person who cut the wire was entrusted by the defendant with superintendence within the meaning of the statute, that the plaintiff with eight or ten other men was at work near the plank, that the superintendent had been examining the concrete wall to ascertain whether it was dry enough to take away the wires, that it had been the custom before cutting such wires to give a warning so that the men could get out of the way, and that this warning always had been given by the superintendent, and it might have been found that it was a part of his duty as superintendent to give it, that on this occasion he decided that the wall was hard enough for the wire to be cut, and, without looking to see whether any men were likely to be hurt and without giving any warning, he cut the wire himself, causing the plank to fall upon the plaintiff. The plaintiff and the others of the group of laborers with him were not within the range of vision of the superintendent when he cut the wire. It was admitted that the plaintiff was in the exercise of due care. *Held*, that the plaintiff was entitled to go to the jury, who could have found that the proximate cause of the

plaintiff's injuries was not the manual act of cutting the wire, which the superintendent chose to do himself, but was the determination to cut the wire at that particular moment without giving any warning and without ascertaining whether a warning was necessary. *Mooney v. Benjamin F. Smith Co.* 270.

7. In an action under the employers' liability act for injuries received while in the employ of the defendant from being struck by a plank, which had been held in place by a wire against a concrete wall in process of hardening and which fell upon the plaintiff when the wire was cut by a superintendent of the defendant without giving the plaintiff any warning that the plank was about to fall, where there was evidence warranting a finding that the proximate cause of the plaintiff's injuries was the determination of the superintendent to cut the wire when he did without giving any warning and without ascertaining whether a warning was necessary, although he chose to cut the wire with his own hand instead of ordering a subordinate to cut it, the further fact appeared in evidence, that earlier in the day this superintendent had been directed by the general superintendent of the building to examine the wall and ascertain whether it was hard enough to allow the cutting of the supporting wires. *Held*, that the evidence in regard to the order of the general superintendent was immaterial, because this order, although given by a superior, was issued to one clothed with the powers of a superintendent, and left to him the exercise of his usual authority as to the way in which and the time when the wire cutting should be done. *Ibid*.

Of person in charge of train.

8. In an action against a railroad corporation for personal injuries, sustained while in the employ of the defendant as a night conductor in one of the defendant's freight yards, alleged to have been caused by the negligence of a day conductor of the defendant employed in the same yard when in charge or control of a train of the defendant, there was evidence for the plaintiff that, soon after 7.35 o'clock on a dark evening in April, the plaintiff in accordance with his duty and custom made an inspection of the tracks at the southerly end of the yard and ascertained that no cars were so near any adjoining track as to be struck by cars in motion upon it, and that on track number 4 there was room for three or more cars, that a few minutes later he boarded a locomotive, of which he had charge, and went to the northerly end of the yard, where the day conductor was at work with a switching engine and crew, that the day conductor said that he only had two or three more switches to make, after which he was going to the roundhouse at the southerly end of the yard, and should stop work for the day, that thereupon the plaintiff told him that they were making up a train on track number 6 in the southerly end of the yard and told him to look out for them if he was to use any of those tracks which had switches to reach tracks 4 and 6 and others, that to this the day conductor replied that he would look out for them, that it was the duty of the day conductor to see that no cars which were moved under his orders were left where they could not clear cars moving on adjoining tracks, that there was a

Negligence (continued).

custom in the yard when a car was so placed that it would be struck by a car running on another track "to notify anybody that would be liable to use that end of the yard," that no such notification was received by the plaintiff, that by eight o'clock the day conductor had stopped work and his switching engine was put up for the night, that the plaintiff and his crew did not go upon track number 4, but that at 8.15 P. M., when going from the southerly end of the yard to track number 6, they came in collision with cars left on track number 4, and the plaintiff was injured. The plaintiff on cross-examination testified that it was his business "to know that the cars cleared before" he "made a single switching movement." The locomotives in charge respectively of the plaintiff and of the day conductor were the only ones in use in the yard that night. *Held*, that, although it was the plaintiff's duty to know that the tracks were clear, it could not be ruled as matter of law that he was wanting in ordinary prudence in relying on his inspection made about half an hour earlier, when he had found that their condition was safe, and that the question of the due care of the plaintiff was for the jury. *Held, also*, that there was evidence from which negligence on the part of the day conductor might be inferred, and that the question of his negligence was for the jury. *Lury v. New York, New Haven, & Hartford Railroad*, 540.

9. In an action against a railroad corporation for personal injuries sustained while in the employ of the defendant as a night conductor in one of the defendant's freight yards, alleged to have been caused by the negligence of a day conductor of the defendant employed in the same yard when in charge of a train of the defendant, the plaintiff may be asked by his own counsel the question, "Did you have when you were going up there that night on that train any knowledge or appreciation that there was any danger in so doing?" to which he answers "No, sir"; because whether the plaintiff knew or as a prudent person ought to have known of the risk he incurred is material upon the question of his due care. *Ibid*.

Duty to warn.

10. There is no duty incumbent upon an employer to warn an employee, who for some weeks has been at work for the employer at an electric power house and who on a certain day has been set at work at stripping the lead covering from wire cables used for the conducting of electricity, of the general danger in working upon or near such cables when they are heavily charged with electricity, especially when the employee is fully aware of such risk. *Grebenstein v. Stone & Webster Engineering Corp.* 431.
11. It is not the duty of the proprietor of a retail store, in a department of which a new floor is being laid while business is being carried on, to warn an intelligent saleswoman of mature years employed by him in this department that she must look out for a plank, which is lying nearly flat on the floor with one end of it resting on the edge of the new upper surface of the floor that is being laid, and must be careful to step over it so as not to stumble; and a failure to give such an unnecessary warning is not evidence of negligence. *Healy v. Gilchrist Co.* 393.

Dangerous place in which to work.

12. The principal and usual exit from the second floor of a box factory to the office was by a well lighted passageway three or four feet wide, on the right hand side of which was a bench about three feet high upon which was a circular saw, about five inches of which protruded above the bench. The belts and shafting which ran the saw were in full view. On the bench also was a carriage which was used to push boards along the bench parallel to the passageway upon the saw. The saw was provided with a hinged cover or guard which generally was over it, but which occasionally was removed so that large boards could be sawed. From that part of the bench where the saw was, slanting into the passageway about a foot to the floor, ran strips of board. The lower part of the saw was covered with a blower. The end of the bench away from the exit made a corner around which persons went when passing to the office. The saw was between two and four feet from that end. The saw was not started and stopped by a shipper, but by machinery in the basement of the factory. A boy thirteen years and ten months of age, who had been employed in the factory about a week and who had received no warning or instructions with regard to the saw, was passing, after the whistle for shutting down had blown, around the end of the bench and into the passageway to the office when his coat caught on something, he reached around with his hand to free it, his hand came into contact with the saw and was cut off. At the time there was no operator at the bench. *Held*, that the presence of the saw and the danger of injury from coming into contact with it were obvious risks which the boy assumed when he entered upon his employment; and that the additional danger from the cover's being removed occasionally was not hidden and did not entitle the employee to additional warning; that, therefore, the injury was not caused by any negligence for which the employer was responsible. *Scanlan v. George G. Page Box Co.* 12.
13. It is proper for the judge presiding at the trial of an action of tort by an employee of a corporation, engaged in constructing a steel bridge over the tracks of a railroad, against his employer to recover for injuries caused by a temporary staging, upon which the plaintiff was working, being struck by a locomotive engine passing on the railroad, the declaration in which contained two counts at common law, one alleging as the cause of the injury a failure to warn the plaintiff of the approach of the locomotive engine and the other alleging as the cause the negligent placing of the plaintiff at work in a dangerous place without taking proper precautions for his safety, and also contained counts under R. L. c. 106, § 71, cl. 2, alleging as the cause of the injury negligence of a superintendent of the defendant, to rule that the plaintiff cannot recover, if on the view of the testimony most favorable to the plaintiff it appears that the plaintiff and certain of his fellow workmen constructed the temporary staging, that at the time the plaintiff knew that if it was not high enough passing trains would hit it, and that the defendant's superintendent repeatedly told the plaintiff to be sure to have the staging high enough to be out of the way of passing engines and trains, and if there is no evidence that the superin-

Negligence (*continued*).

- tendent or any of the men suspected that the staging was too low for safety, and there was affirmative evidence that it could not have been put any higher and be of use, and if, as to warnings of approaching engines and trains, the testimony is that such warnings were given by the railroad company's flagman, who is not shown to be acting for the defendant, and occasionally by any one, superintendent or workmen, who happened to see a train approaching. *Colford v. New England Structural Co.* 283.
14. The declaration in an action of tort by an employee in a box factory against the proprietor of the factory alleged that the plaintiff was injured by reason of negligence of the defendant in not giving to him sufficient instructions or warnings of the dangers attending his work. At the trial it appeared that at the time of his injury the plaintiff was eighteen years of age and had worked for the defendant for six or seven weeks. From his appearance and manner of testifying the jury might have been of opinion that he was below the average intelligence of one of his age, but there was no evidence that the defendant had any notice of such mental deficiency or any reason to have apprehended it. The plaintiff was injured while operating a matching machine, which was composed of an iron table set on four iron legs and having upon it two circular saws six inches in diameter each set in a slot about an inch in width and ten inches long. Three eighths of an inch of each saw was above the surface of the table. Beneath the table and fitting into the space between its legs was a box meant to catch the shavings and to be removed by the operator from time to time. There was evidence that the plaintiff never had been warned as to the part of the saw under the table, nor instructed to avoid it, and he testified that he did not know that the saw went under the table or that there was anything there to cut his hand. While he was reaching down to draw out the box his hand, because a part of the box was broken off, went under the table farther than he had intended and was injured by the saw. *Held*, that it was difficult to say that the plaintiff's injury did not come from an obvious risk of his employment; but, without deciding that question, that there was no evidence that the defendant was negligent in failing to instruct or warn the plaintiff under the circumstances. *Cote v. D. W. Pin-gree Co.* 286.
15. In an action by a foreman plumber, employed by a firm consisting of two members who were performing certain work under a contract with a corporation conducting an amusement park, against his employers and the corporation, for injuries received by slipping upon an oily floor in the passageway of a pump house so that his arm was caught by the revolving cog wheels of the pumping machinery, when he had been sent to the pump house by one of his employers and also by an agent of the defendant corporation in order to try the valves and to see what the trouble was that prevented the water from flowing down a chute which was operated by the defendant corporation, it appeared that the slippery condition of the floor, of which the plaintiff had no previous knowledge, was due to the leaking of oil from a cracked and broken glass oil cup on the crank shaft of the pump, that the defendant corporation had used this cracked and leaky oil cup for several days in such a place that a large part of its contents con-

tinually flowed upon the floor of the passageway of the pump house near the machinery, where it was or might become necessary for others than those in charge of the machinery to pass, that, although the plaintiff's employers did not own the pump house nor operate the machinery, yet it might have been found to have been a part of their work to regulate the flow of the water down the chutes and to test the valves, and in order to do this it was necessary to go to the place where the plaintiff was injured. There was evidence tending to show that each of the plaintiff's employers knew of the leaking oil cup several days before the accident, and that one of them had promised to remedy it. *Held*, that there was evidence of negligence not only on the part of the defendant corporation but also on the part of the plaintiff's employers, who might have been found to be negligent in setting the plaintiff at work in a dangerous place of which he was ignorant without giving him any warning, and that, even if they had no right to change the oil cup, they had a knowledge of the danger which imposed upon them the duty to warn the plaintiff of its existence. *Bagley v. Wonderland Co.* 238.

16. In an action by a foreman plumber against his employers for personal injuries, there was evidence that between daylight and dark on a cloudy night in June the plaintiff's employers sent him to a pump house to try the valves which controlled the water supplied for a chute, and to see what the matter was which prevented the water from flowing down the chute as it should; that the valves were turned from a window in the pump house and to reach this window it was necessary to pass along a passageway inside the pump house about eighteen inches wide between the side of the pump house and unguarded cog wheels in motion; that the pump house had been built and the machinery installed in it after the plaintiff was employed by the defendants; that he had not been to the place for fifteen days and never before had seen the pump in operation nor had had anything to do with opening or closing the valves; that there were certain glass oil cups on the machinery from which the oil dripped slowly on the machinery when it was in motion, that about a week before the accident one of these cups on the crank shaft, holding about a gill of oil, was cracked from top to bottom and had a piece nicked out of it; and that the oil from this cup ran down upon the floor in such quantities as to be tracked about; that notice of this condition had been given to the defendants, but that the cup was not changed before the accident; that the plaintiff, coming from the greater light out of doors and walking in the dark toward the window to regulate the valves, slipped by reason of the oil on the floor and his arm was caught on the revolving cog wheels and was mangled; that within a few minutes after the accident there was oil on the floor for the width of the passageway and for a length of four or five feet; that the passageway "was pretty well covered with oil" and there were marks as if a man had slipped; that oil was dripping on the floor from the cracked cup and that no oil came upon the floor from any other source. *Held*, that the question whether the plaintiff was in the exercise of due care was for the jury, and that it was for the jury to say whether in the dusk he could have seen the condition of the floor or should have pro-

Negligence (continued).

cured more light before proceeding toward the window. *Held, also, that the plaintiff did not assume the risk of such an injury by his contract of employment, because the broken oil cup and the slippery floor had come into existence after his contract of employment was made and he did not in fact know of the danger which caused his injury. Bagley v. Wonderland Co. 238.*

Case where employer was held not to be under duty to warn employee of danger in working upon or near electric cables, see *ante*, 10.

Failure of proprietor of department store to warn intelligent saleswoman of danger of stumbling over obvious plank laid on floor while repairs were being made is not negligence, see *ante*, 11.

Dangerous or defective machinery or appliances.

17. The mere fact, that the proprietor of a woodworking establishment caused a defective buzz planer to be repaired by a reputable maker, does not exempt him from liability for injury to an employee which occurred during a month after the repairs were made. *Phillips v. Lockey Piano Case Co. 59.*

18. Where, at the trial of an action against the proprietor of a woodworking establishment by an employee therein to recover for injuries alleged to have been caused by a defective buzz planer, there was evidence tending to show that there was a vibration and uneven motion on the part of the machine, that boards which went through it came out, not well planed, but rough like a washboard, and that such facts would indicate that something was loose about the fastening of the cylinder of the machine, which condition would cause a board being planed to draw the operator's hand in toward the knives, and that the plaintiff was injured by having his hand drawn in by a board which he was pushing into the planer, it is proper for the presiding judge to refuse a request for a ruling that "the mere fact that there was vibration or uneven motion in the machine furnishes no evidence of a defect in the machine." *Ibid.*

19. At the trial of an action against the proprietor of a woodworking establishment by an employee therein to recover for injuries alleged to have been due to a defective condition of a buzz planer, the plaintiff's evidence in chief had tended to show that the machine was defective as alleged, and one who had acted as superintendent of the defendant had testified as part of the defendant's case that at the time of the accident to the plaintiff the machine was not out of repair. In rebuttal, the plaintiff was allowed to call a witness who testified that, after the accident, the defendant's superintendent, who previously had testified, had stated, "I will see that no one else runs that machine but myself until it is fixed." *Held, that, while the testimony was not competent to show an admission which was binding upon the defendant, it was admissible as tending to contradict the previous testimony of the superintendent. Ibid.*

20. Where, at the trial of an action against the proprietor of a woodworking establishment by an employee therein, who was injured by having his hand drawn into a buzz planer, there was evidence that just before the accident the planer "jarred and would not allow the cutter to cut smoothly, making a washboard effect," the following questions were held to be

proper to put to one who was an acknowledged expert in woodworking and woodworking machinery, and the answers were held to be responsive and admissible: "Q. Assume that a person is at work operating a buzz planer and planing stock two inches wide and five eighths of an inch thick, and that said stock when planed appears to be rough and of a washboard effect as testified to, what in your opinion does that indicate to be the matter with the machine, if anything? A. It would indicate something was loose about the fastening of the cylinder of the machine. — Q. What in your opinion would be the effect upon a board passing over the knives of the planer with a loose cylinder? A. In my opinion the board would ride upon and jump in cross-grain or anything, and if a man's hand was anywhere near, it would pull his hand in towards the knives according chiefly to the way he had hold of it." *Phillips v. Lockey Piano Case Co.* 59.

21. In an action by an employee against his employer, a bridge building corporation, the declaration contained a count at common law alleging a negligent failure of the defendant to provide the plaintiff with safe and proper tools and appliances to use in his work. At the trial there was evidence tending to show that the plaintiff was at work with three fellow employees in hammering iron rivets into an iron bridge by the use of a pneumatic hammer, that when in its proper condition the piston of the hammer would remain at rest unless a trigger upon it was pressed, that a pneumatic hammer requires frequent cleaning in order to keep particles of dust from getting under the valve and setting the piston in motion without the trigger being pressed, that, also, the hammer should be inspected frequently because a spring which keeps the trigger up and the valve closed is likely to become weak and to cause a leaking which would put the piston in motion. There was further evidence tending to show that the hammer had not been cleaned or inspected for a considerable period before the accident, and that, previous to the accident, the hammer, when not in use but lying on the ground, had been seen to move and twist, but there was no evidence that the plaintiff understood the inner mechanism of the hammer or was qualified to or did attach any significance to such fact. There also was evidence that, while a fellow workman of the plaintiff was holding the hammer and when there was no pressure on the trigger, the piston suddenly started and struck and destroyed the plaintiff's eye. *Held*, that it could not be ruled as matter of law either that the plaintiff was wanting in due care or that, having anticipated what occurred, he voluntarily exposed himself to the danger; and also, that there was evidence from which the jury would have been warranted in finding the defendant negligent in failing to perform its common law duty of providing safe appliances for the plaintiff's use and to use due diligence in keeping those which were supplied in repair. *Cormo v. Boston Bridge Works*, 366.

22. To set an inexperienced boy sixteen years of age at work upon a machine press used for cutting narrow strips of copper by a knife, which when the machine is in order comes down only upon the pressing of a treadle, but which at the time that the boy is put at work also comes down without such pressure, and to furnish the boy with a reel from which the

Negligence (continued).

strips of copper are fed into the cutting press which is defective and frequently gets stuck so that the operator has to pull the strip of copper with his hand, and to give the boy no warning of the dangerous character of his employment, although the defects in both the press and the reel have existed during a period of two months and the employer frequently has been notified of their existence, is evidence of negligence toward the boy on the part of his employer in an action brought by the boy against the employer for having his fingers cut off by the knife coming down automatically, when the boy's hand had slipped from the strip of copper in pulling at it, because the reel had stuck, and was directly under the knife. *Donovan v. Chase-Shawmut Co.* 248.

23. If an inexperienced boy sixteen years of age is put at work upon a press for cutting narrow strips of copper, called wire, and the knife which cuts the wire is started by pressing a treadle, but the machine is out of order so that the knife sometimes comes down two or more times when the treadle has been pressed only once, and sometimes comes down without any pressure at all, and the boy sees this happen, but, being ignorant of machines, does not know whether the press is out of order or not, and if the reel from which the wire is fed into the cutting press requires constant attention to prevent the wire from spreading out and sometimes gets stuck so that the operator has to take hold of the wire and pull it, and if this boy, having been given no warning of danger, after he has worked upon the cutting press less than three hours, of which the first two hours were at night on the day before the accident, takes hold of the wire to pull it because the reel has stuck, and his hand slips off the wire and comes under the knife of the press just as it is descending automatically without the boy having pushed the treadle, in an action by the boy against his employer for his injuries thus caused, it cannot be ruled as matter of law that this was an accident of which the plaintiff accepted the risk by continuing at the work, and, assuming that there is evidence of negligence on the part of the defendant, he is entitled to go to the jury, his knowledge that on some previous occasions the knife which caused his injuries had come down without pressure on the treadle not being decisive against his recovery, because appreciation of the significance of the event as well as knowledge of it is necessary to charge him with assumption of the risk. *Ibid.*

24. In an action for personal injuries, which were received while the plaintiff was in the defendant's employ more than six years before the time of the trial and when the plaintiff was an inexperienced boy sixteen years of age, if certain answers of the plaintiff upon his cross-examination, when separated from his other testimony, appear to indicate a comprehension on his part of the danger which he incurred in the defendant's employ, but some of the defendant's questions were so phrased as to appear to refer to the time of the trial, others were ambiguous in this regard, and still others by trifling changes referred to the time of the accident, it is proper for the jury to consider whether the plaintiff's expressions apparently manifesting appreciation of the danger were intelligent assertions of a knowledge possessed at the time of the injury or

were the result of an acute cross-examination addressed to a wearied or confused intellect and eliciting acquiescence by skilfully framed questions. *Donovan v. Chase-Shawmut Co.* 248.

25. In an action at common law by a workman for personal injuries sustained while in the employ of the defendant, if the plaintiff shows that a representative of the defendant ordered him to perform work which involved the use of a defective machine without giving him any warning or information of a concealed danger owing to such defect, of which the plaintiff could be found to have been ignorant but of which the defendant's representative knew or should have known, there is evidence for the jury of negligence on the part of the defendant. *Ruddy v. George F. Blake Manuf. Co.* 172.

26. In an action at common law by a workman against his employer for personal injuries alleged to have been caused by a part of the machine in connection with which the plaintiff was working starting of itself, when if it had been in proper condition it would have remained stationary, if there is evidence that a fellow servant of the plaintiff, with the plaintiff's assistance, attempted to start this part of the machine with bars or attempted to use this part of the machine after he knew that it was not in repair, this does not deprive the plaintiff of his right to go to the jury, if there is other evidence warranting a finding that the proximate cause of the automatic movement of the part of the machine was a defect in its mechanism, of which the defendant ought to have known and of which the plaintiff did not know and was not warned. *Ibid.*

27. Where a part of a machine which is operated by compressed air starts into motion of itself, when if it was in proper condition it would remain stationary, and in thus moving causes an injury to a workman employed by the proprietor of the machine to work in connection with it, in an action at common law by the workman against his employer for his injuries thus caused, the fact of the automatic starting of the portion of the machine, if unexplained, tends to show that the apparatus in some way had become defective, and, if this fact is supported by evidence that for some time before the day of the accident the part of the machine which thus started into motion had been seen to be working irregularly and badly and that notice of its condition had been given to the defendant's superintendent, there is evidence for the jury of negligence on the part of the defendant. *Ibid.*

Evidence held to show that plaintiff was acting within scope of employment in such case, see AGENCY, 4.

Evidence, offered in action by employee in hat factory against employer for injuries alleged to have been caused by falling of hat form upon plaintiff's foot, which was held to have been excluded properly as too remote and as being opinion evidence on subject which was not proper for expert testimony, see EVIDENCE, 6, 8.

Incompetent fellow servant.

Incompetency of fellow servant of plaintiff, alleged to have caused injury, to recover for which plaintiff brought action against employer, cannot

Negligence (continued).

be proved by evidence of previous accident to plaintiff caused by negligence of same fellow servant, see EVIDENCE, 9.

*Street Railway.**Traveller in highway.*

28. In an action against a street railway corporation for personal injuries from being run into by a car of the defendant moving at a high rate of speed along a single track of the defendant at the side of a road in a town, when the plaintiff was attempting to cross the track from an intersecting driveway, if there is evidence that the car of the defendant was moving at a rate of speed forbidden by the ordinances of the town and also that the motorman was violating a rule of the defendant which required him to run the car slowly and ring the gong in approaching a driveway or crossing, there is evidence for the jury of negligence on the part of the motorman for which the defendant would be responsible. *Horsman v. Brockton & Plymouth Street Railway*, 519.

29. In an action against a street railway corporation for personal injuries from being run into by a car of the defendant, when the plaintiff was attempting to drive in a covered delivery wagon from an intersecting driveway across a single track of the defendant at the side of a road in a town, where it was necessary to cross the track to reach the main part of the road, there was evidence that for a distance of about eighty-five feet before reaching the track of the defendant the driveway by which the plaintiff was approaching the track was lined with trees and shrubbery in full foliage obstructing the view on the side from which the car was coming, but that before reaching these obstructions at least three hundred feet of the track could be seen clearly. The plaintiff, who was familiar with the vicinity, testified that at this point he leaned forward and looked down the track and saw no car, that he then sat back and drove on at a moderate rate of speed, listening for vehicles whose approach might require him to change his course until he was run into by the car of the defendant, which was moving at a high rate of speed and was sounding no gong, that in the previous summer he had worked for the defendant as a motorman and had operated electric cars over the same track, and that the rule of the railway company was for the motorman to run the cars slowly and ring the gong when approaching a driveway or crossing. The plaintiff also testified that he acted upon his judgment that if a car came along at the usual rate of speed he had ample time to get over the track. *Held*, that the question whether the plaintiff was in the exercise of due care was for the jury, who were to say whether the plaintiff was justified in assuming that he had time to cross the track in safety or whether he should have stopped and alighted to ascertain whether a car was coming before attempting to cross the track, and also were to say how far the plaintiff, from his knowledge of the defendant's method of operating its cars in reducing their speed and sounding the gong at intersecting streets and driveways, was justified in relying on an assumption that these precautions would be continued and that the motorman would not act carelessly. *Ibid*.

80. In an action against a corporation operating a street railway, for personal injuries from being run into by a car of the defendant while the plaintiff was driving a pair of horses attached to a heavy wagon on a street of a town in winter after dark, if it appears that the portion of the way outside the tracks of the defendant was covered with ice and snow and that the footing for the plaintiff's horses was better between the rails where there was no ice and where the plaintiff had been driving at a walk for about five minutes when the car of the defendant ran into him from behind, the questions of the due care of the plaintiff and the negligence of the defendant are for the jury. *Callahan v. Boston Elevated Railway*, 422.

Statement of principle governing liability in such case, see *post*, 59.

81. At the trial of an action against a street railway company to recover for personal injuries received in a collision between a car of the defendant and a wagon in which the plaintiff was driving, there was evidence tending to show that just previous to the collision the plaintiff was driving on the right hand side of a street in the middle of which were tracks of the defendant, that just in front of him was a milk wagon going but a little faster than a walk, that there was not sufficient room for him to get by the milk wagon on the same side of the track without coming within the range of a car that might pass, that, desiring to pass the milk wagon, he looked around and saw a car of the defendant approaching "quite a distance away so that . . . he thought that he would have ample time to get by before they [the car] could come on to him," that he thereupon tried to drive by the milk wagon, but just as he was getting by and out of danger the left hind wheel of his wagon was struck by the car and he was injured. The motorman of the car, testifying for the defendant, stated that at the time when the plaintiff looked back the car was going about eight miles an hour. *Held*, that there was evidence tending to show that the plaintiff exercised a reasonable judgment as to how far distant the car was before he attempted to pass the milk wagon, and that the questions, whether he was in the exercise of due care and whether the motorman was negligent, were for the jury. *Carroll v. Boston Elevated Railway*, 429.

82. At the trial of an action against a street railway company for injuries caused by a collision between an electric street car of the defendant and a top buggy in which the plaintiff was driving, there was evidence tending to show that the collision occurred at about 9.30 P. M. on a July 31 upon a city street fifty or sixty feet wide running northerly and southerly with double street railway tracks in the middle, that just previous to the collision the plaintiff, driving in a southerly direction with the flap at the back of the buggy up so that he had an unobstructed view of the street and tracks behind him, stopped at the curbing on the westerly side of the street to allow a guest to alight, that thereafter he looked behind him and saw a car approaching at a distance of three or four hundred feet, struck the horse with a rein, turned his buggy toward the east and was crossing the street in a semicircle turning toward the south, when the car struck the buggy between the front and rear wheels, breaking the whiffletree and both front wheels, dishing the rear wheels, breaking the box and the top

Negligence (*continued*).

of the buggy and pushing the buggy along ten or twelve feet before the car came to a stop. The plaintiff testified that he did not remember whether he heard a bell or gong before the car struck the buggy, that he was familiar with the locality and knew that cars ran there every three or four, and sometimes every five or ten minutes, and that he could easily have seen up the track as he was crossing it. There was no evidence as to whether the gong of the car was sounded. There was evidence tending to show that the car at the time of the collision and immediately before was going very rapidly. *Held*, that it could not be said as matter of law that the plaintiff was not in the exercise of due care, or that the motorman was not negligent, and that the case was for the jury. *Hatch v. Boston & Northern Street Railway*, 410.

Whether servant of plaintiff, who was driving plaintiff's wagon on track of street railway and was struck by car which he had seen approaching, was negligent, was held to be question for jury, see *post*, 60.

Person attempting to board car in highway.

33. A young woman, who is ignorant of a custom existing in a city where she recently has arrived of entering the rear vestibule of a street car by the door on the right hand side while other cars are being operated on a parallel track at the left of the car, is not necessarily a trespasser in attempting to enter such a car as a passenger by standing upon the step leading to the left hand door of the vestibule, which is closed while the right hand door is open, and rapping on the closed door for admission, and, if she is on the car lawfully, the conductor, when he sees her on the step and knows her evident purpose of entering the car, owes her the duty of exercising reasonable care for her protection until at least an opportunity has been given her to step down in safety. *Yancey v. Boston Elevated Railway*, 162.

34. If a young woman, who is suffering from a dislocation of the hip and is carrying crutches which have been furnished to her to lessen the weight upon her hip in walking, being in a city where she is ignorant of a prevailing rule and custom as to entering the rear vestibule of a street car by the door on the right hand side while cars are being operated on a parallel track at the left of the car, stands upon the step leading to the left hand door of the vestibule of such a car with both hands on the grab irons, holding her crutches, and raps upon the closed door for admission, whereupon the conductor, seeing her there, shakes his head and immediately gives the signal to start the car, and the car starts, throwing the young woman to the ground, in an action brought by her against the corporation operating the railway, for her injuries thus caused, it cannot be ruled as matter of law that the plaintiff was negligent in being upon the step at the time of the accident, as it could not reasonably be anticipated that, if the plaintiff was refused admission on that side of the vestibule, the car would be set in motion instantly without allowing her time to step off. *Ibid*.

35. In an action against a corporation operating a street railway, for injuries sustained by the plaintiff in falling from the step of a car of the defendant when the plaintiff had been attempting to enter the car by the left

hand door of the rear vestibule, which was closed in accordance with a rule of the defendant, and the conductor on refusing to open the door had given at the same time a signal to start the car, which, being obeyed by the motorman, caused the accident, the jury should be instructed that, if they find that the plaintiff was not in the exercise of due care or was a trespasser upon the car, they can find the defendant liable only by finding that the acts of the conductor amounted to wilful and wanton recklessness toward the plaintiff. *Yancey v. Boston Elevated Railway*, 162.

36. In an action against a corporation operating a street railway in Boston, for personal injuries from being thrown from a step of an electric street car of the defendant, it appeared that the plaintiff was a young woman who suffered from permanent lameness owing to a dislocation of the hip and had been furnished at a hospital, from which she was returning, with crutches to lessen the weight upon her hip in walking. It could have been found that the plaintiff was not familiar with the methods of entering street cars in Boston, that she crossed the street and approached from the left hand side a vestibule car of the defendant which was stopping at a street crossing for the admission of passengers, that the left hand door of the rear vestibule of the car, on the side toward the parallel track, was closed and locked in accordance with a rule of the defendant and some persons were getting on or off on the right hand side of the vestibule where the door was open, that the plaintiff approached the car with the intention of entering it as a passenger, that she stood upon the step leading to the door on the left hand side of the vestibule with both hands on the grab irons, holding her crutches, and rapped upon the closed door, asking for admission, that the conductor saw her, but shook his head and did not open the door and at the same time rang the bell for the car to start, which it did, carrying the plaintiff a short distance, when being unable to retain her footing she fell off into the street and was injured. It further could have been found that the conductor must have understood that the plaintiff was attempting to enter the car for the purpose of becoming a passenger. *Held*, that the plaintiff's mistake as to the method of entering the car, which the jury could find was owing to her ignorance of the rule and custom as to entering from the right hand side, did not necessarily make her presence on the car unlawful, and that, if she was on the car lawfully, the conductor, knowing of her presence and of her evident purpose, owed her the duty of exercising reasonable care for her protection until at least an opportunity had been given her to step down in safety; that it could not be ruled as matter of law that the plaintiff was careless, as it could not have been reasonably anticipated that the car would be set in motion instantly without allowing the plaintiff time to step off; and that there was evidence of wilful misconduct on the part of the conductor in giving the signal to start the car in such a way as to cause the plaintiff in her crippled condition to fall into the street while the car was in motion, which would make the defendant liable even if the plaintiff was not in the exercise of due care or was a trespasser; but that the defendant was entitled to have the jury instructed that to find the defendant liable on this ground the acts of the defendant's servant must be shown to have amounted to wilful

Negligence (*continued*).

and wanton recklessness toward the plaintiff; and, on account of a refusal of the presiding judge to give such an instruction, exceptions of the defendant were sustained after a verdict for the plaintiff. *Yancey v. Boston Elevated Railway*, 162.

37. In an action against a corporation operating a street railway, it appeared that the plaintiff was a young woman, who was suffering from a dislocation of the hip and was carrying crutches which had been furnished to her to lessen the weight upon her hip in walking, and that, being ignorant of a prevailing rule and custom that where there are parallel street railway tracks in a street a person must enter the rear vestibule of a street car from the right hand side, she got upon the step leading to the left hand door of the vestibule of such a car with both hands upon the grab irons, holding her crutches, and rapped upon the closed door for admission, and that the conductor, seeing her there, shook his head and immediately gave the signal to start the car, whereupon the car started, and the plaintiff, after being carried a short distance, was unable to retain her footing and fell into the street and was injured. *Held*, that there was evidence of wilful misconduct on the part of the conductor, in giving the signal to start the car in such a way as to cause the plaintiff in her crippled condition to fall into the street while it was in motion, which would make the defendant liable even if the plaintiff was a trespasser. *Ibid*.
38. In an action by a crippled young woman against a corporation operating a street railway, for injuries sustained by the plaintiff in falling from the step of a car of the defendant when the plaintiff had been attempting to enter the car by the door on the left hand side of the rear vestibule, which was closed in accordance with a rule of the defendant, and the conductor on refusing to open the door had given at the same time a signal to start the car, which, being obeyed by the motorman, caused the accident, the declaration contained two counts, the first count seeking to recover on the ground that the plaintiff was upon the step of the car lawfully and was in the exercise of due care and was injured by reason of the negligence of the conductor, and the second count seeking to recover on the ground that, even if the plaintiff was not in the exercise of due care or was a trespasser, the defendant should be held liable because the accident was caused by the wilful misconduct of the conductor in starting the car while the plaintiff was upon the step without giving her time to get off. There was evidence on which it could have been found that the plaintiff was upon the step of the car lawfully and on which it could have been found that the plaintiff was in the exercise of due care. There also was evidence on which it could have been found that the conductor was negligent or it could have been found that he was guilty of wilful misconduct toward the plaintiff. The presiding judge refused to instruct the jury that, if the plaintiff was not in the exercise of due care or was a trespasser upon the step of the car, the defendant could be held liable only in case the acts of the conductor amounted to wilful misconduct toward the plaintiff. The case was submitted on both counts to the jury, who returned a general verdict for the plaintiff. *Held*, that, as each of the counts stated a good cause of action and the verdict was general, there was no means of knowing on

which count the jury had found the defendant liable and had assessed damages; and that, although there was no error as to the first count, the jury might have returned the verdict improperly on the second count, by holding the defendant liable for mere negligence of the conductor, even in case they had found that the plaintiff was not in the exercise of due care or was a trespasser; and therefore that an exception by the defendant to the refusal of the ruling requested must be sustained. *Yancey v. Boston Elevated Railway*, 162.

39. It cannot be stated as a general proposition of law that a conductor of a street railway car is not bound to warn a person intending to enter the car not to place his hand on a door that is in the process of opening, because the circumstances may be such that the conductor has reason to apprehend that a person intending to enter the car may sustain an injury in entering it by placing his hand on the door which is in the process of opening, if he is not warned, and in that case it is the duty of the conductor to give such a warning. *Carter v. Boston & Northern Street Railway*, 21.
40. In an action against a street railway corporation for personal injuries alleged to have been sustained while the plaintiff was in the act of entering a car of the defendant as a passenger, if it appears that the car was of the kind which is called semi-convertible and in which the doors are opened and shut by a device operated by the motorman, and the evidence tends to show that the door when nearly open came to a stop and then started to open farther and in opening the rest of the way cut off the end of the plaintiff's finger, there being other evidence tending to show that the plaintiff in placing his hand on the door was in the exercise of due care, a finding is warranted that the plaintiff's injury was due either to negligence on the part of the motorman who operated the lever which opened and shut the door or to some defect in the construction of the car. *Ibid.*
41. In an action against a street railway corporation for personal injuries alleged to have been sustained while the plaintiff was in the act of entering a car of the defendant as a passenger, if it appears that the car was of the kind which is called semi-convertible and in which the doors are opened and shut by a device operated by the motorman, and the evidence tends to show that the door when nearly open came to a stop and then started to open farther, that the plaintiff, believing that the doorway was ready for him to enter, it being in the evening and very dark, in feeling for the handle of the door or the rail put his hand upon the door itself and that the door in opening the rest of the way cut off the end of his finger, and if it also appears that during this time the conductor was standing in the doorway and was silent and gave the plaintiff no warning, it cannot be ruled as matter of law that the plaintiff was not in the exercise of due care in placing his hand upon the door instead of upon the handle of the door or upon the rail next to it to assist him in entering. *Ibid.*

When person attempting to enter door of semi-convertible street railway car becomes passenger, see STREET RAILWAY, 1, 2.

Passenger in subway attempting to board car.

42. A corporation, which operates a street railway in the subway in Boston, where the platforms in the stations are well lighted, and which has instructed the conductors of cars entering and leaving the stations to stand upon the lower right hand step of the rear platform of the cars, facing outward with one hand grasping the hand rail on the body of the car and the other the rail on the dasher "to keep any person from boarding the car while it is in motion," need not take the additional precaution of requiring, as to trains composed of two closed surface cars coupled together, that the doors into the rear vestibule of the first car shall be closed until the trains come to a standstill, and a failure to make this requirement is not evidence of negligence on the part of the corporation. *Gagnon v. Boston Elevated Railway*, 488.
43. In actions against a corporation operating a street railway in the subway in Boston to recover for the conscious suffering and death of the plaintiff's intestate, who, while attempting to get aboard the first car of a train of two closed surface cars as they were passing slowly to a berth in a station in the subway, lost his hold and fell beneath the rear car and was run over and killed, it appeared that rules of the defendant required its conductors to stand upon the lower right hand step of the rear platform of cars entering the station, facing outward with one hand grasping the hand rail on the body of the car and the other the rail on the dasher "to keep any person from boarding the car while it is in motion," that the conductor on the car which the plaintiff's intestate attempted to board was not on such step but was on the platform of the car, that there was no crowd upon the platform, which was well lighted, and that the plaintiff's intestate was acting under no exigency, infirmity or limitation. *Held*, that under the circumstances the act of the conductor in not observing the rules of the defendant did not constitute negligence toward the plaintiff's intestate. *Ibid*.
44. In actions against a corporation operating a street railway in the subway in Boston to recover for the conscious suffering and death of the plaintiff's intestate, who, while attempting to get aboard the first car of a train of two closed surface cars as they were passing slowly to a berth in a station in the subway, lost his hold and fell beneath the rear car and was run over and killed, it appeared that the conductor of the rear car, who in the course of his duties was standing on the step of the rear platform thereof, saw the plaintiff's intestate as he was falling, called out loudly to the conductor of the forward car, who was disobeying a rule of the corporation and was upon the rear platform and not upon the step of the car which the plaintiff's intestate was attempting to board, and then, either without giving any signal from the platform where he was or without giving an emergency signal which would have caused the car to be stopped instantly, ran forward to assist the plaintiff's intestate. *Held*, that there was no evidence of negligence on the part of the conductor of the second car toward the plaintiff's intestate. *Ibid*.

Passengers.

45. The provisions of St. 1907, c. 392, which impose a fine and civil liability upon a corporation operating a street railway for causing the death of a passenger by reason of the unfitness or negligence of its agents or servants while engaged in its business, are penal in their character and this liability of the corporation is not affected by the question whether the passenger was in the exercise of due care. *Jones v. Boston & Northern Street Railway*, 108.
46. In an action by an administrator against a street railway corporation under St. 1907, c. 392, for causing the death of the plaintiff's intestate while a passenger on a car of the defendant by reason of the negligence of a servant of the defendant, evidence offered by the defendant, to show that at the time of the accident the intestate was riding on the front platform of the car where printed notices were posted stating that passengers riding on the front platform did so at their own risk and that the intestate knew of the existence of these notices and had discussed their effect with the motorman, is not admissible, any lack of due care on the part of the intestate being immaterial, and the evidence having no tendency to show that the intestate was not a passenger and having no bearing on the degree of culpability of the defendant affecting the assessment of damages. *Ibid.*
47. A declaration in an action of tort by a woman passenger against a street railway company alleged that the plaintiff "was injured through the negligence of the defendant, its agents and servants, by means of fire being set to her clothing from the electric heating apparatus of the said car, or other appurtenances of the said car, so that the plaintiff received severe injury to body and mind." The evidence of the plaintiff tended to show that, as the plaintiff sat upon a seat in the car, flames came from beneath the seat and set fire to her clothing, and that she sprang up and in doing so wrenched her side, that the injury to the clothing was slight, but that the injury to the side was severe. *Held*, that under the declaration the plaintiff could claim damages for the injury to her side. *Steverman v. Boston Elevated Railway*, 508.

Principle governing foregoing decision, see CARRIER, 1.

48. At the trial of an action by a woman against a street railway company to recover for injuries alleged to have been received by the plaintiff while she was a passenger upon a closed electric car of the defendant, the plaintiff testified that, while she was sitting on a seat of the car, her ankles felt hot and, looking down, she saw flames "gushing right out and my clothes got afire and I jumped very quickly aside . . . and in doing so I got a terrible stitch in my left side." It also appeared that a fellow passenger quickly "clapped" out the fire in the plaintiff's clothing, and that her dress and boots were burned only slightly. The defendant introduced evidence tending to show that there was but a slight outburst of flame which caused the passengers to leave their seats only a short time, but offered no explanation of the presence of the flames. *Held*, that there was evidence which warranted the jury in finding that the presence of the

Negligence (*continued*).

flames was due to negligence for which the defendant was responsible, that the plaintiff acted reasonably in anticipating bodily injury from the flames and springing to her feet, and therefore that the injury to her side was caused by negligence for which the defendant was accountable. *Steverman v. Boston Elevated Railway*, 508.

49. At the trial of an action by a woman against a street railway company to recover for personal injuries alleged to have been caused by flames which came from beneath a seat of a closed electric car of the defendant upon which the plaintiff was a passenger, the plaintiff testified that, as she was sitting in the car, her ankles felt hot and, looking down, she saw flames "gushing right out and my clothes got afire and I jumped very quickly aside . . . and in doing so I got a terrible stitch in my left side." There was evidence from which the jury would have been warranted in finding that the presence of the flames in the car was due to negligence for which the defendant was responsible. The flames only slightly burned the plaintiff's clothing and in no way burned her person. The defendant asked the presiding judge to rule that "there is no evidence of physical injury," and that "the act of standing up, not accompanied with physical contact with any part of the car, is not such physical injury or battery as will warrant the submission of the case to the jury." The rulings were refused and there was a verdict for the plaintiff. *Held*, that the rulings were refused rightly, since, if the jury found, as they were warranted in finding on the evidence, that the plaintiff, acting as a reasonable person in the presence of danger, moved to one side quickly and in doing so wrenched her side and thereby suffered an external injury accompanied by a serious nervous shock causing severe pain, they might treat her injuries, in assessing damages, as the direct result of the accident. *Ibid*.

50. The declaration in an action against a street railway company under R. L. c. 111, § 267, to recover for the death of a passenger who received injuries resulting in death because he jumped from the front seat of an open car of the defendant when there was an explosion in the electric controller, alleged that the death resulted from gross negligence on the part of the defendant's servants or agents. At the trial the plaintiff introduced evidence of the happening of the explosion, but did not introduce any independent evidence to show that there was anything defective or improper in the construction or operation of the car, although he did introduce evidence tending to show that previous to the explosion the car had been running smoothly, that it had stopped and started in the ordinary way, and that there was nothing unusual about it. *Held*, that under the circumstances it could not be said that the explosion of itself furnished evidence of such conduct on the part of the defendant's servants or agents as to constitute gross negligence. *Martin v. Boston & Northern Street Railway*, 18.

Elevated Railway.

51. In an action by a woman passenger against a carrier which operated trains of elevated railway cars in a subway, for personal injuries caused

by falling into the space between a car forming part of such a train and the platform of a station in the subway, from which the plaintiff was attempting to enter the car, the plaintiff testified that on account of the crowd she could not look down to see where she stepped and that her movements were constrained by the crowd around her. She also testified that, although she paid no attention to the space between the platform and the car, it was because she thought she "had been going along" and felt that she "was safe, and, knowing that there was a platform there and feeling that it was used," she did not "feel unsafe or uncertain about the ground." This court, in deciding that there was no evidence of negligence on the part of the defendant, was not prepared to say that, had there been such evidence, the question of the plaintiff's due care might not properly have been left to the jury. *Anshen v. Boston Elevated Railway*, 32.

52. In an action by a woman passenger against a carrier which operated trains of elevated railway cars in a subway, for personal injuries caused by falling into the space between a car forming part of such a train and the platform of a station in the subway, from which the plaintiff was attempting to enter the car, the fact that after the accident occurred the defendant took means to prevent a repetition of it is not evidence of negligence. *Ibid.*

53. In an action by a woman passenger against a carrier which operated trains of elevated railway cars in a subway not constructed by the defendant, for personal injuries caused by falling into the space between a car forming part of a five-car train of the defendant and the platform of a station in the subway, from which the plaintiff was attempting to enter the end door of the second car of the train, it appeared that the platform was nearly straight for a part of its length and for the rest of its length was on a concave curve, that trains of different lengths were used at different hours of the day, and that during the hours when the traffic was heaviest five-car trains were run, that underneath the permanent platform were five movable or sliding platforms for the purpose of bridging the space between the permanent platform and the cars, that these sliding platforms were operated by means of levers moved by two men on the permanent platform and were intended to be used in connection with the middle doors of the cars but were not intended to be used and were not used for the doors at the ends of the cars, that the distance from the permanent platform to the centre of the door by which the plaintiff was attempting to enter was normally eight inches and might vary two inches more or less owing to the swing and oscillation due to passengers getting in and out and to other causes. One witness testified that by estimation this distance at the time of the accident was nine and one half inches. The same witness testified that she visited the subway on the day after the accident and that the movable platform at the place of the accident then was extended. The evidence tended to show that where the cars and the platform were parallel there was a space of about three inches between them and that this was the least space that could be allowed properly. The plaintiff contended that the defendant was negligent in

Negligence (*continued*).

not using the movable platform or some other appliance at the time of the accident to lessen the space between the permanent platform and the door of the car by which the plaintiff was attempting to enter. *Held*, that, inasmuch as the movable platforms were not installed for use at the end doors, the case should be considered as if there had been no movable platforms, and, assuming that the open space was ten inches, which was the greatest width that it could have been found to be, the existence of this space and the failure to bridge it were not evidence of negligence. *Anshen v. Boston Elevated Railway*, 82.

54. Where a corporation, which operates both an elevated railway and street railway lines, maintains a station at which cars and trains of both lines discharge and receive passengers and has provided for passengers therein a safe way of exit from its elevated trains to surface cars, it is the duty of such a passenger to use the way provided, and if, knowingly and without any invitation express or fairly to be implied from the situation and arrangement of the station and platforms, he leaves the way marked out by the carrier and proceeds to pass to a surface car by some other platform, he ceases to be a passenger and becomes a trespasser or at most a mere licensee. It makes no difference that he uses a platform where other passengers before him have gone unless there is an invitation express or implied on the part of the carrier. Following *Legge v. New York, New Haven, & Hartford Railroad*, 197 Mass. 88. *Boden v. Boston Elevated Railway*, 504.
55. An elevated railway company in Boston, which also operated a number of street car lines upon the surface of the streets, maintained a station at which passengers leaving an elevated train could pass across a well lighted platform and down a few steps to another well lighted platform two hundred and five feet long and twenty-one feet wide, which was covered and ran parallel to a track where surface cars discharged and received passengers. Surface cars approached this platform by passing first up an incline and around a large curve like a horseshoe. From the end of this covered platform which was adjacent to the part of the track where the track ceased to curve and came alongside of it, a narrow platform, uncovered and constructed of varying width along the curve of the track and of boards with spaces between them, was built for the use of employees of the company. It was not lighted in the evening. At a point ninety-five feet from the covered platform there was a rise of about six inches and the platform was narrowed about two feet, leaving an opening where the floor of the wider portion ceased. A passenger on an elevated train at half past ten o'clock at night passed down to the covered platform and, seeing a car which he desired to take approaching and being fearful lest, if he waited to take the car at the usual place, he would not be able to get a seat because of the number of passengers, walked out upon the narrow, unlighted, uncovered platform to a place with which he was not familiar, stepped off at the opening ninety-five feet from the passenger platform, and received injuries, to recover for which he brought an action against the elevated railway company. At the trial of the action there was evidence tending to show, besides the foregoing facts, that other persons had

gone out upon the narrow platform to meet cars for the same reason that the plaintiff had. *Held*, that the plaintiff had not been invited to use the platform where he was when he was injured, that he had no right there as a passenger, but was at most a mere licensee, and that the only duty which the defendant owed to him was to refrain from wanton or reckless conduct that would put him in peril, which duty the defendant had not violated; and, *also*, that there was no evidence that the plaintiff was in the exercise of due care. *Boden v. Boston Elevated Railway*, 504.

Railroad.

56. In an action by an administratrix against a railroad corporation under R. L. c. 111, § 267, for causing the death of the plaintiff's intestate by reason of the alleged gross negligence of the defendant's servants, it appeared that the plaintiff's intestate was in the employ of the city in which the accident occurred, and for about three months had been at work with others under the charge of an assistant superintendent of the water works of the city in laying a water pipe across the location of tracks on which trains were operated by the defendant, at a place not far from a large terminal station and near a yard for passenger coaches and a coaling station for locomotives, that it was a very noisy place and there were many tracks there, that trains and locomotives constantly were passing and re-passing, both backing and going forward, and that from the place where the accident occurred trains coming from the terminal station were visible for about two hundred feet. There was evidence tending to show that when a locomotive was coming from the direction of the station with its tender forward, it was impossible from the cab to see the track where the plaintiff's intestate was, that the workmen of the city had been warned repeatedly to look out for themselves, and that it was customary, when the gang of men to which the plaintiff's intestate belonged was at work on the tracks, for one of the intestate's fellow employees to be posted nearer the station, where he could see down the curve to give warning of approaching trains, but that at the time of the accident no such man was at this post for the reason that all the men of the gang with the exception of the plaintiff's intestate, had left the tracks for other work, that the plaintiff's intestate remained behind and was bending over to pick up some blocking, when he was struck by the tender of a locomotive which was backing from the direction of the station and was drawing a train of cars on one of the main outward tracks. There was some evidence that it had been a custom for trains coming from the terminal station to ring a bell and that no one heard the bell of this engine ring, that the defendant knew that the work of the city was going on and that the train which caused the injury did not stop. *Held*, that there was no evidence for the jury of gross negligence of any of the agents or servants of the defendant. *Devine v. New York, New Haven, & Hartford Railroad*, 416.

Action against railroad company by employee to recover for personal injuries, see *ante*, 8, 9.

In Use of Highway.

With respect to defects in highway.

57. At the trial of an action under R. L. c. 51, § 18, against a town to recover for personal injuries caused by the plaintiff's running into a barrier in a highway while he was riding from his work to his home on a bicycle, there was evidence tending to show that the highway was open to public travel, that the accident happened at about seven o'clock in the evening of an October 2, that it was dark and that there were no lights at the place of the accident, that the barrier could not be seen until one was close upon it, and that when the plaintiff ran into the barrier he was travelling at the rate of about seven miles an hour. *Held*, that the question, whether the plaintiff was in the exercise of due care when he was injured, was for the jury. *Burditt v. Winchester*, 493.

58. At the trial of an action against a telephone company by a boy sixteen years of age to recover for injuries alleged to have been received by him because, while he was driving a covered grocery wagon in a street in a city, the top came into collision with a rope which the defendant had stretched across the street, there was evidence tending to show that the rope was about an inch in diameter and extended diagonally across the street from the top of a pole, on the left hand side of the street as the plaintiff was driving, into the branches of a tree in full bloom on the right hand side of the street, where it was fastened at a point about seven feet from the ground; that the plaintiff was assisting his father in the grocery business by taking and delivering small orders and collecting bills, that at the time when the accident happened he was driving a safe horse at an ordinary trot, and that "for a minute and a half or two to three minutes or something like that" before the wagon struck the rope, he was turned around on the seat of the wagon, arranging some baskets behind him and was not looking ahead, that he held on to the reins while so doing, and that "the first thing he knew he fell out of the wagon." *Held*, that under the circumstances it could not be said as matter of law that the plaintiff was wanting in due care because as he drove along he was not looking ahead all of the time in anticipation of such a defect in the highway, or that he was negligent in turning around and arranging the baskets in the wagon behind him. *Langley v. New England Telephone & Telegraph Co.* 46.

With respect to street cars on highway.

59. Owing to the fact that street cars run on rails and cannot turn out, persons travelling on the same highway by other methods must regard this limitation, and if when a car is approaching they are upon the part of the way which is between the rails they should leave that space at once if reasonably practicable; but travellers in vehicles are not obliged to be constantly on the watch to observe the approach of a car from behind and under ordinary circumstances rightfully may assume that the driver of such a car will use common prudence to avoid collision with persons who are exercising their rights as travellers with ordinary care. *Callahan v. Boston Elevated Railway*, 422.

Application of foregoing principle, see *ante*, 30.

60. If a servant of a farmer, who is driving a pair of large and heavy horses attached to a wagon containing a heavy load of swill, turns diagonally across the single track of a street railway for the purpose of entering a driveway leading from the street to the farm of his employer, and as he turns looks back and sees a coal car on the street railway near the top of a hill about four or five hundred feet distant, which is approaching from behind on a down grade with an unobstructed view, and, instead of attempting to turn back, he continues to cross the track, still looking at the approaching car, and nods his head to the motorman in a way that can be interpreted to mean that, he, having miscalculated the distance or having failed to appreciate the rate of speed of the car, hopes that the motorman can stop or retard the car so as to avert a collision or lessen its force, and thereupon the car, moving at an excessive rate of speed which is not diminished, strikes the team, killing one of the horses and injuring the wagon, in an action by the farmer against the corporation operating the car for the loss of and injury to his property, the question whether the plaintiff's servant was in the exercise of due care is for the jury. *O'Brien v. Lexington & Boston Street Railway*, 182.
61. At the trial of an action against a street railway company by one who, while being driven in an express wagon, was injured in a collision between the wagon and a car, of the defendant, it appeared that the plaintiff had had an experience of two years as an expressman in the neighborhood of the accident, which ended two years before the accident, that, having business with one who was the driver and a part owner of the express wagon, he had been invited to sit with him upon the wagon seat, that the plaintiff knew the driver to be experienced and familiar with the locality, that the wagon was drawn by two horses and was heavily loaded with merchandise piled high above the heads of the occupants, that, at about half past seven o'clock in the evening of the last day of October, the driver drove the wagon thus loaded on a driveway at a descending grade to the street and at right angles across the single track of a street railway to the farther side of the street, this course being adopted in order to avoid a sharp turn with the heavy load, that the driver then proceeded for about three hundred feet on the left hand side of the street, and was turning to cross to the right hand side when the plaintiff noticed the approaching street car, that by the driver's conduct it was indicated to the plaintiff that the driver at the same time observed the car, that the driver urged the horses with the reins, having no whip, but that the car, which some of the evidence tended to show was approaching at the rate of thirty-five miles an hour on a down grade, struck the wagon before it could be got off the track. *Held*, that, while perhaps it could be said that there was no evidence of due care on the part of the driver, which point was not decided, there was evidence for the jury on the question of the plaintiff's due care, he being justified in trusting something to the care and experience of the driver and not being called upon to warn the driver, whose guest he was, of dangers of which the driver seemed to know. *Ingalls v. Boston & Lexington Street Railway*, 78.

Negligence (*continued*).

Action against street railway company by person who was run into by street car from behind as he was driving on street railway track in order to pass wagon in front of him, see *ante*, 81.

If driver of automobile in running into open trench in highway in city is negligent and negligence contributes to injury, there can be no recovery against city by owner or occupants of automobile, see *WAT*, 4.

Action against street railway company by one who was run into by car as he was driving across tracks and knew that car was approaching from rear, see *ante*, 32.

In Use of Automobile.

If driver of automobile in running into open trench in highway in city is negligent and negligence contributes to injury, there can be no recovery against city by owner or occupants of automobile, see *WAT*, 4.

In Management of a Department Store.

62. At the trial of an action against the proprietor of a department store by a child five years and eight months of age for injuries caused by being pushed down a stairway by a crowd in the store, it appeared that the child and her mother had been at a counter on a balcony between the first and second floors and were returning down a stairway to the first floor when the accident happened. The only means of access to the balcony, which was forty feet by one hundred feet, was by a stairway of ordinary dimensions and construction, consisting of two flights of stairs with a landing between. There was evidence tending to show that the stairway was poorly lighted, that the store was crowded, that there was a bargain sale of jewelry going on at a counter within six feet of the head of the stairs leading from the balcony to the first floor, and that just before the accident the superintendent of the store made an announcement in a loud voice the natural result of which was to attract crowds to the jewelry bargain counter. The plaintiff's mother testified that, holding the plaintiff by the hand, she was going down the stairway from the balcony to the first floor when persons rushing from behind her to avoid the crowd assembling at the jewelry counter pushed the plaintiff from her and down the stairs. *Held*, that there was no evidence that would have warranted a finding that the defendant was negligent in leaving the stairway as it was, or that the accident was in any way due to the poor lighting of the stairway; and that under the circumstances there was no duty on the part of the defendant to warn his customers as to the stairway. *Lord v. Sherer Dry Goods Co.* 1.

Failure of proprietor of department store to warn intelligent saleswoman of danger of stumbling over obvious plank laid on floor while repairs were being made is not negligence, see *ante*, 11.

In Use of Electricity.

63. Electricity being a highly dangerous element, one employing it for his own purposes is held to a correspondingly high degree of care in its use. *O'Donnell v. Boston Elevated Railway*, 200.

64. At the trial of an action against a corporation operating an elevated railway by the use of electricity, for personal injuries received by the plaintiff, while travelling upon Shawmut Avenue in Boston, from an explosion in a manhole at the southeast corner of Shawmut Avenue and Pleasant Street through which ran several of the cables used by the defendant for the transmission of electricity, it appeared that the manhole and the cables were in the exclusive charge and control of the defendant. The evidence of the plaintiff tended to show that on previous occasions gas had leaked into the manhole, that for about two hours before the explosion a little smoke had been seen coming out of a subway very near the manhole, into which the cables from the manhole ran and where the defendant's cars ran, and that about fifteen minutes before the explosion smoke was seen coming out of the manhole, that not long before the explosion there had been a fire in the subway at a point about two hundred feet south of Boylston Street, caused by the short circuiting of a large cable there, which had set fire to a wooden box through which it ran and which had affected two or three of the cables which ran into the manhole where the explosion occurred, partly melting off their insulation, although the part of the cables that was in the manhole was intact, and that there was an automatic circuit breaker at the defendant's power station, the opening of which would have shut the power off from a wire. The chief of the city fire department testified that, when he entered the subway at the time of the fire therein, there was still some electric current in the cables, but that subsequently it was shut off so that he could make an examination. The defendant offered no evidence. *Held*, that there was evidence from which, in the absence of any explanation of the explosion by the defendant, whose officers and men had the best means of knowledge on the question, a finding that the explosion was due to negligence of the defendant or its servants or agents was warranted. *Ibid*.

In Working near Electricity.

Action by employee for injuries used in stripping insulation from electric cable, see *ante*, 8, 10; PRACTICE, CIVIL, 20.

Of one owning or controlling Real Estate.

In management of department store, see *ante*, 62.

Failure of proprietor of department store to warn intelligent saleswoman of danger of stumbling over obvious plank laid on floor while repairs were being made is not negligence, see *ante*, 11.

In Railroad Yard.

Action against railroad company by night conductor in freight yard of company for injuries alleged to have been due to negligence of day conductor, see *ante*, 8, 9.

Action for death of employee of city who was run over in railroad yard while he was helping to lay water pipe therein, see *ante*, 56.

Negligence (continued).

In a Factory.

Action for injury to employee from exposed saw on bench near passageway in factory, see *ante*, 12.

Action by boy sixteen years of age against employer for injuries due to defect in wire cutting machine, see *ante*, 22-24.

Evidence, offered in action by employee in hat factory against employer for injuries alleged to have been caused by falling of hat form upon plaintiff's foot, which was held to have been excluded properly as too remote and as being opinion evidence on subject which was not proper for expert testimony, see EVIDENCE, 6, 8.

Action by employee in woodworking establishment to recover from employer for injuries alleged to have been due to defective condition of buzz planer, see *ante*, 17-20.

Action against employer by employee, who was injured, while at work with circular saw upon cutting table in box factory, by his hand coming in contact with lower part of saw as he reached under table, see *ante*, 14.

Action by employee against employer to recover for injuries received by carrier car being started at wrong time, which was held not to be maintainable because injury was caused by negligence of fellow employee of plaintiff, see *ante*, 4.

In a Foundry.

Action by employee in foundry against employer to recover for injuries alleged to have been caused by automatic starting of machine due to defect in it, see *ante*, 25-27; AGENCY, 4; PLEADING, CIVIL, 1.

In Construction of Building.

Action by employee against employer to recover for injuries caused by falling of plank due to cutting of wire which held it against concrete wall while wall was hardening, see *ante*, 5-7.

While constructing Bridge over Railroad.

Action by employee against employer for injuries caused by plaintiff being struck by train passing below him as he was working in construction of bridge over railroad, see *ante*, 13.

Res ipsa loquitur.

Unexplained automatic starting of certain machine was held to be some evidence that it was defective, see *ante*, 27.

In action against corporation, operating elevated railway in subway by means of electricity, to recover for personal injuries caused by explosion in subway, certain facts, unexplained by defendant, were held to warrant finding of negligence on part of defendant or its servants or agents, see *ante*, 64.

Mere fact of explosion in electric controller of open electric street car, where previous to accident car had been running smoothly and had stopped and started in ordinary way, was held not to constitute evidence of gross negligence on part of company's servants or agents, see *ante*, 50.

Of Public Officers.

Negligence of county commissioners, which was held to have occurred while they were acting as public officers, and for which therefore county was not liable, see COUNTY COMMISSIONERS, 8.

Actions by Husband or Wife for Loss of Consortium.

See DAMAGES, 3.

Violation of Rule as Evidence of Negligence.

In action by person driving delivery wagon on highway against street railway company, to recover for injuries due to collision of street car with his wagon, violation by motorman of ordinance of town as to speed, and of rule of company as to slowing down and ringing gong at crossing, was held to constitute evidence of negligence, see *ante*, 28.

Violation of Ordinance as Evidence of Negligence.

In action by person driving delivery wagon on highway against street railway company, to recover for injuries due to collision of street car with his wagon, violation by motorman of ordinance of town as to speed, and of rule of company as to slowing down and ringing gong at crossing, was held to constitute evidence of negligence, see *ante*, 28.

Gross.

Action for death of passenger on street car alleged to have been caused by gross negligence of servants or agents of street railway company, see *ante*, 45, 46.

Action against street railway company for causing death of passenger attempting to board car in subway in which it was held that there was no evidence of negligence of corporation or of its servants, see *ante*, 42-44.

Action against railroad corporation for death of employee of city working in defendant's yard alleged to have been caused by gross negligence of defendant's servants or agents, see *ante*, 56.

Mere fact of explosion in electric controller of open electric street car, where previous to accident car had been running smoothly and had stopped and started in ordinary way, was held not to constitute evidence of gross negligence on part of company's servants or agents, see *ante*, 50.

Causing Death.

Action against railroad corporation for death of employee of city working in defendant's yard alleged to have been caused by gross negligence of defendant's servants or agents, see *ante*, 56.

Action against street railway company for conscious suffering and death of passenger attempting to board car in subway, in which it was held that there was no evidence of negligence of corporation or of its servants, see *ante*, 42-44.

Negligence (continued).

In action against street railway company for causing death of person riding on front platform of street car, question, whether deceased saw notice that person riding on front platform did so at his own risk, was immaterial, because deceased was passenger at any rate, and whether or not he was in exercise of due care did not affect statutory liability of defendant, see *ante*, 45, 46.

See also *ante*, 50.

Wilful and Wanton Recklessness.

Refusal of judge, presiding at trial of action against street railway company by one who was injured by conductor's starting car while plaintiff was upon left hand step of car and attempting to board it from wrong side, to instruct jury that, if they found plaintiff unlawfully on step, conductor in starting car must be found to have been guilty of wilful and wanton recklessness in order for plaintiff to recover, was held to be sufficient to sustain defendant's exceptions, see NEGLIGENCE, 86, 88.

While it also was held that there was evidence which properly would have warranted finding of such conduct on part of conductor, see NEGLIGENCE, 87.

NEW TRIAL.

See PRACTICE, CIVIL, 10.

NOTICE.

Action by mortgagee of personal property against officer attaching it, involving determination of validity of certain notices given by mortgagee to officer and propriety of acts of officer in premises, see ATTACHMENT, 1.

OFFICER.

As to public officers, see PUBLIC OFFICERS, 1, 2; COUNTY COMMISSIONERS, 1-9.

Chief of police of Norwood, attending court at Dedham to prosecute criminal cases in District Court of Northern Norfolk in course of duties for which he was paid salary, was not allowed to collect witness fees, see POLICE, 1-3.

ORDER.

Order for construction of sewer in Commonwealth Flats, as incumbrance to title of land adjoining sewer, see DEED, 2, 3; CONTRACT, 12.

PARTNERSHIP.

Proof of Existence.

1. While it is true that declarations or acts of one partner, in the absence or without the knowledge of the other, are not evidence of the existence of

the partnership as against such other, such declarations or acts are admissible against the party making them, and the existence of a partnership thus may be established against both partners by the separate admissions of the individuals composing it. *Merrick v. Bilafsky*, 488.

What constitutes.

2. At the trial of an action against a father and his son for the purchase price of certain plumbing goods which were alleged to have been furnished by the plaintiff under a special contract made with the defendants about July 30 of a certain year for use in buildings which were being erected for a third party, a material question was whether the defendants were partners. There was evidence tending to show that shortly after the son became of age, which was previous to the time of the alleged contract with the plaintiff, he and his father, whose name was B., used the same office and a letter head with the imprint "B. & Son, Real Estate and Insurance," with the office address thereon; that in the January preceding the making of the contract, in bankruptcy proceedings concerning the person for whom the houses were being built, the father had testified that he and his son were partners; that bills for the goods furnished were sent almost weekly to the father at the office occupied by him and his son, and that not until November, after substantially all of the goods had been furnished and actually used, was any notice received from the father that he was not the person to be charged for the goods; that the son had drawn a check in the father's name, by himself as attorney, to pay for the examination of the title of the property upon which the houses were being built; that the father had what was intended ultimately to be a second mortgage upon that property, which had been given by the owner to a man of straw and assigned to him; that the father was on the premises while the buildings were being constructed and made complaints in regard to some of the materials that were furnished; that the father was introduced by one agent of the plaintiff to another as one of their customers while the goods were being furnished, and made no objection thereto; that the son in talking to the plaintiff's agent said that "they" wanted to get the plumbing material, and spoke of their interest in the property, using the word "we," and, upon the agent's refusing credit to the owner, assented to the offer of the plaintiff to furnish the goods to "them" if "they" would pay for them; and that a letter by the plaintiff's agent to the father requesting a written order for goods "your plumber has ordered" came back with the words indorsed thereon in pencil, "Send goods at once"; that while the account was running some one who said he was "Mr. B." asked the plaintiff's agent over the telephone to change the account from the name of the father to that of the son, as the son was acting as trustee for the owner. The foregoing evidence was contradicted in all essential particulars. *Held*, that the question whether the defendants were partners was for the jury. *Merrick v. Bilafsky*, 488.

3. In an action by a foreman plumber for personal injuries against his two employers, alleging that they were copartners doing business under

a firm name and in that name had a contract with another defendant, a corporation, for doing certain work, the plaintiff's employers raised the objection that there was no evidence of the existence of a copartnership between them. Their names were respectively A. and S. It was not questioned that a person or persons doing business as the A. and S. Construction Company had a contract with the defendant corporation for doing the work upon which the plaintiff was employed. It appeared that both A. and S. were upon the premises every day, and that A. had referred to S. as his partner, that S. hired men, gave directions indicative of a master's power and, when notified of the defective appliance which was the cause of the plaintiff's injury, "said he would have it seen to." A printed letter head used by A. bore the names of both A. and S. Several witnesses in testifying referred to "A. and S." as a firm, and this testimony remained in evidence without objection. *Held*, that there was evidence sufficient to warrant a finding of the existence of the copartnership. *Bagley v. Wonderland Co.* 233.

PASSENGER.

When person attempting to enter partly opened door of semi-convertible street railway car becomes passenger, see *STREET RAILWAY*, 1, 2.

Actions against street railway and elevated railway companies for personal injuries or death of passengers and of persons attempting to enter cars, see *NEGLIGENCE*, 33-55; *CARRIER*, 1.

PAYMENT.

Presumption, that witnessed note has been paid when it has been due for more than twenty years, is presumption of fact which can be rebutted by any legal evidence, see *BILLS AND NOTES*, 5.

PERSONAL PROPERTY.

Attachment of mortgaged personal property, see *ATTACHMENT*, 1.

PLEADING, CIVIL.

Declaration.

1. In an action at common law by a workman against his employer for personal injuries sustained while in the employ of the defendant, a count alleging a defect in a machine in connection with which the plaintiff was working is not inconsistent with another count for a failure of the defendant to give notice to the plaintiff of the danger incidental to the use of the defective machine. *Ruddy v. George F. Blake Manuf. Co.* 172.

Declaration in action against street railway company for injuries resulting from negligence which caused flames to burst into closed car, under which it was held plaintiff could recover for injury to side due to her jumping suddenly away from flames, see *NEGLIGENCE*, 47.

Where no question of pleading is expressly raised at trial, imperfections in declaration cannot be relied upon by defendant to defend ordering by presiding judge of verdict for defendant, which was excepted to by plaintiff, see **PRACTICE, CIVIL, 15.**

PLEADING, CRIMINAL.

Indictment and Bill of Particulars.

Motions to quash and to dismiss indictment for murder because of alleged insufficiency of particulars furnished in indictment and bills of particulars, which were held rightly to have been denied, see **HOMICIDE, 1-4.**

POLICE.

1. Under R. L. c. 204, §§ 42, 44, the chief of police of a town, who is receiving a salary as such chief and as a police officer and whose duty it is to be the prosecuting officer for the town and to have charge of all criminal complaints and to prosecute offenders, is not entitled to witness fees for attendance "as a witness at a place other than his residence" in cases which it is his duty to prosecute. *Sackett v. Sanborn*, 110.
 2. Whether under the provision of R. L. c. 204, § 44, that any of certain officers attending court "as a witness at a place other than his residence" shall be allowed a witness fee, which applies only to such attendance as is outside the performance of the duties for which such officer is paid, a police officer of the town of Dedham, who resides in the town of Norwood, when attending as a witness at the District Court of Northern Norfolk, which sits at Dedham and includes in its jurisdiction the town of Norwood, is attending "as a witness at a place other than his residence," here was not determined, because the attendance of the plaintiff was in the performance of the duties which he was paid a salary for performing, so that he was not entitled in any case to recover under the statute. *Ibid.*
 3. Whether a police officer of a town, who is entitled to witness fees under R. L. c. 204, § 44, for attending as a witness in criminal cases at a place other than his residence, can recover such fees in an action against the clerk of the court in which the cases were tried, or whether he should bring his action against the town, here was not determined, because the plaintiff was held to be entitled to no fees. *Ibid.*
- City is not liable to person assaulted and robbed by police officers appointed by it, see **PUBLIC OFFICERS, 1.**

POLICE, DISTRICT AND MUNICIPAL COURTS.

Right of appeal in criminal case in police, district or municipal court is only from sentence after conviction, see **PRACTICE, CRIMINAL, 2.**

Appeal from sentence in criminal case in police court which was held to have come too late, see **PRACTICE, CRIMINAL, 3.**

There is no right of appeal from order of police, district or municipal court revoking suspension of sentence granted under St. 1905, c. 338, amending R. L. c. 220, § 1, see **PRACTICE, CRIMINAL, 4.**

PRACTICE, CIVIL.

Amendment.

Case where, at trial of action by employee against employer in which declaration contained counts under employers' liability act and at common law and plaintiff elected to strike out all but common law count and received verdict thereon, this court, upon deciding that there was no cause of action on common law count, nevertheless did not order judgment for defendant under St. 1909, c. 236, but in its rescript gave leave to Superior Court to permit plaintiff to amend declaration and proceed upon count under statute, see *post*, 20.

Election between Defendants.

1. At the trial of an action of contract against a husband and a wife, where the evidence is conflicting and, if the husband is found to have made a contract with the plaintiff as the wife's agent, the husband should not be held liable, but the wife should be, but, if such agency is not found to exist, the husband should be held liable but not the wife, an exception of the defendant to a refusal by the presiding judge to compel the plaintiff to elect as between the defendants will not be sustained if the jury are told in the charge that the plaintiff can recover against only one of the defendants. *Reid v. Miller*, 80.

Election between Counts.

2. The declaration in an action of contract against a husband and a wife contained three counts. The first count alleged that the defendants owed the plaintiff \$90 for stone sold and delivered by the plaintiff to the defendants. The second count alleged that at the request of one F., an agent of the defendants, the plaintiff delivered a part of the stone and then ceased delivery because he was not paid; that thereupon the defendants promised the plaintiff to pay \$90 for the stone if he would complete the delivery, and also promised that, if the plaintiff would release F. from any claim on account of the stone and would procure an order for \$90 from F. and would deliver it to them, they would pay the plaintiff \$90; that the plaintiff delivered the stone and procured the order and delivered it to the defendants but that the defendants had not paid the \$90. The third count, added by amendment at the trial of the case and at the close of the evidence, alleged that the defendants agreed with the plaintiff that, "in consideration that he would procure from F. an order on the defendants for \$90, they would pay him \$90," and that the plaintiff procured the order and delivered it to the defendants. The counts were alleged all to be for the same cause of action. At the trial, there was evidence tending to support the allegations of all the counts except that it appeared that the plaintiff did not know the defendant wife in the transaction until the action was commenced, and the jury were correctly instructed that they could find against only one of the defendants. At the close of the evidence, the

defendant asked that the plaintiff be requested to elect which count he would proceed upon. The request was refused. The jury found for the plaintiff against the defendant wife only. *Held*, that the different counts were not so at variance with one another that the plaintiff should have been precluded from relying upon them to meet such a view of the evidence as the jury might take. *Reid v. Miller*, 80.

Interrogatories.

8. Even under the provisions of R. L. c. 173, § 57, before their scope was broadened by the enactment of St. 1909, c. 225, a defendant in an action of tort for personal injuries whose answer was merely a general denial had a right to interrogate the plaintiff upon any specific facts which would go to support his defense of a general denial, subject to the limitations stated in the statute itself, and was not limited to interrogatories as to matters upon which he had the burden of proof. *Grebenstein v. Stone & Webster Engineering Corp.* 431.

Deposition.

Case where, in cross-examination of witness in taking of his deposition, long statement as to matters in controversy in action, made by third party, was read into record, and where judge presiding at trial of action was held not to have acted improperly in permitting such part of deposition to be read to jury, see *WITNESS*, 3.

Actions tried together.

4. In an action against a city for personal injuries received, while the plaintiff was being driven in an automobile, by reason of a defect in a highway of the defendant, a refusal of the presiding judge, to rule that if a defect in the automobile contributed to the accident the plaintiff could not recover, will not be sustained although the ruling asked for was correct, if the refusal has been made immaterial by a verdict of the jury for the plaintiff in another action brought by the owner of the automobile and tried at the same time, which under the instructions given establishes the fact that a defect in the automobile did not contribute to the accident. *Feeley v. Melrose*, 329.
5. In an action against a city for personal injuries received, while the plaintiff was being driven in an automobile, by reason of a defect in a highway of the defendant, an exception to a refusal of the presiding judge, to rule that the plaintiff could not recover if the driver of the automobile was not in the exercise of due care, will not be sustained although the ruling asked for was correct, if the refusal has been made immaterial by a verdict of the jury for the plaintiff in another action brought by the owner of the automobile and tried at the same time, which under the instructions given establishes the fact that the driver of the automobile was not negligent. *Ibid.*

Conduct of Trial.

Election between counts.

See *ante*, 2.

Election between defendants.

See *ante*, 1.

Regarding use of deposition.

Case where, in cross-examination of witness at taking of his deposition, long statement as to matters in controversy in action, made by a third party, was read into record, and where judge presiding at trial of action was held not to have acted improperly in permitting such part of deposition to be read to jury, see WITNESS, 8.

As to witness offered as expert.

Plaintiff in cross-examining witness called by defendant may use him as expert if he can qualify him as such, although defendant did not offer him as expert. In this case witness was held not to have been qualified, see EVIDENCE, 3, 5.

Determination by judge presiding at trial as to qualification of witness offered as expert may be reviewed by this court when all facts upon which determination was made are undisputed, see EVIDENCE, 4.

Discretionary admission of evidence.

Action of judge in admitting in evidence memoranda from which plaintiff had testified in direct and cross-examination, which, it was held, could not be found under circumstances to have been improper, see EVIDENCE, 12.

Evidence of statement of servant of defendant offered at trial in rebuttal, which was admitted rightly as tending to contradict previous testimony of servant, although it was not binding on defendant as admission, see NEGLIGENCE, 19.

Colloquies between counsel and court.

If bill of exceptions does not contain anything to contrary, colloquies between counsel and court therein set forth will be presumed to have occurred in presence and hearing of jury, see *post*, 14.

Requests and rulings.

6. A request for a ruling properly may be refused by the judge presiding at a trial if it singles out only one of several circumstances bearing upon a certain issue and asks for a ruling as to its effect apart from the other circumstances in evidence on the same issue. *Morrin v. Manning*, 205.

7. At the trial of an action of tort for personal injuries, where the case is tried and submitted to the jury upon several counts, alleging different grounds for the defendant's liability, it is proper for the presiding judge to refuse a request of the defendant for an instruction which is applicable to only one of the alleged grounds of liability but is not restricted by its terms to that issue. *Lury v. New York, New Haven, & Hartford Railroad*, 540.

8. Where, at the trial of an action of tort for personal injuries, the plaintiff, in answer to a carefully prepared question addressed to him upon his cross-examination, assents to a statement of a custom in regard to which he has testified on his direct examination, which gives it a different significance less favorable for him than his own previous statement of it, and his attention is not specifically drawn to the possibly vital difference between the custom thus phrased and the statement of it given in his direct examination, it is proper for the presiding judge to refuse to give an instruction based on the assumption that the plaintiff's latest statement of the custom is the correct one, and it is the province of the jury to weigh these apparent inconsistencies in the plaintiff's testimony and determine what the custom was. *Lury v. New York, New Haven, & Hartford Railroad*, 540.

If defendant desires separate verdicts upon different counts of declaration, he should make request to that effect, see *post*, 10.

Exception to refusal of judge to give certain ruling, even if ruling is correct statement of law, will not be sustained if ruling is given in substance in another ruling, or in charge, see *post*, 12.

Where no question of pleading is expressly raised at trial, imperfections in declaration cannot be relied upon by defendant to defend ordering by presiding judge of verdict for defendant, which was excepted to by plaintiff, see *post*, 15.

Judge's charge.

Exception to portion of charge of judge which was not sustained because, although it contained erroneous statement of law, excepting party was not harmed thereby, see *CONTRACT*, 15.

Although certain charge did not state explicitly that burden of proving certain proposition was on plaintiff, it was held that its language must have been understood to have meant that plaintiff could not recover unless such burden was sustained, see *CONTRACT*, 14.

Erroneous statement in charge of judge to jury will not sustain exceptions if, upon his attention being called to it, he corrects statement, see *post*, 13.

Ordering Verdict.

Where no question of pleading is expressly raised at trial, imperfections in declaration cannot be relied upon by defendant to defend ordering by presiding judge of verdict for defendant, which was excepted to by plaintiff, see *post*, 15.

Findings by Trial Judge.

9. Where a judge, before whom an action of contract is tried without a jury, finds for the plaintiff and assesses the damages in a certain sum without stating the rule which he adopted as to the measure of damages, it will be assumed that he proceeded upon the true rule. *Page v. Johnston*, 274.

Verdict.

10. The declaration in an action of tort contained three counts, one for the conversion of the furniture and provisions in a restaurant, the second

Practice, Civil (*continued*).

for the conversion of "divers bank notes and coins to the value of \$35," and the third for trespass in wrongfully excluding the plaintiff from the restaurant. At the trial it appeared that the money described in the second count was in the restaurant and that it and the furniture and provisions described in the first count were seized by the defendant under circumstances which could have been found to have made him liable as a trespasser *ab initio*, so that there was evidence which warranted a verdict for the plaintiff on each of the counts. The presiding judge was not asked to instruct the jury to find a verdict as to each count and did not do so. The jury returned a general verdict for the plaintiff. The defendant moved for a new trial on the ground that the jury should have been ordered to find separately as to each count. The motion was overruled. *Held*, that the motion properly was overruled, because, if the defendant wished that separate verdicts should be returned, he should have asked for an instruction to that effect, and also because as respected the question of damages the three counts of the declaration were closely connected with each other and described acts substantially forming parts of one transaction, so that the presiding judge well might have thought that it was best that damages should be assessed in one general sum. *Morrin v. Manning*, 205.

General verdict, in action of tort where declaration contained several counts, which was held not to have cured erroneous refusal of presiding judge to give ruling to which defendant was entitled, see NEGLIGENCE, 38.

General verdict in action where declaration contained three counts, must be assumed to have been returned on counts upon which plaintiff had right to recover, so that, where defendant did not ask specifically to have verdict ordered for him on count that plaintiff could not recover on, but asked merely that general verdict for defendant be ordered and excepted to refusal of judge to do so, exceptions must be overruled, see *post*, 17.

Where actions against city respectively by person, who was being driven in automobile by servant of owner, and by owner of automobile, are tried together, if verdict is returned for owner in his action, defendant was not harmed by failure of judge to instruct jury as to effect of negligence of driver upon right of plaintiff to recover, or in accordance with principle that there could be no recovery if injury was caused by defect in automobile, since, to find for owner, jury must have been of opinion that neither negligence of driver of automobile nor defect in automobile contributed to cause accident, see *ante*, 4, 5.

New Trial.

See *ante*, 10.

Report by Judge.

Report by single justice of petition for writ of mandamus after hearing brings to this court only questions of law, see MANDAMUS, 1.

Order as to Entry of Exceptions.

11. Where a judge of the Superior Court, in a case which has been appealed to the Superior Court from the Land Court, has ordered that the respond-

ent, who has alleged exceptions to certain rulings made in the Superior Court and whose exceptions have been allowed, shall enter his exceptions in this court on or before a certain day and that, if they are not so entered, the exceptions "shall thereupon be overruled and the rulings and orders excepted to affirmed unless the court, for good reason, extends the time," and the respondent, without procuring any extension of time, fails to comply with the order, and, upon his entering the exceptions in this court two days late, this court upon motion of the petitioner dismisses the exceptions, the case is still pending in the Superior Court, which still may revoke its former order and extend the time within which the exceptions must be entered in this court, and the petitioner has not an absolute right to have a motion allowed that "the final decision of" the Superior Court be "certified to the Land Court," there not having been any final decision. *Old Colony Street Railway v. Thomas*, 529.

Appeal.

Case determining questions as to time of entry of appeal from refusal of assessors to abate tax, and as to notice to respondents, see *TAX*, 4.

Exceptions.

12. An exception to a refusal by the judge presiding at a trial to give a certain ruling will not be sustained, even if the ruling states correctly a pertinent proposition of law, if the judge includes the ruling refused in another ruling which he gives at the request of the same party, and also in his charge states to the jury substantially the proposition of law stated in the ruling which he refused. *Minihan v. Boston Elevated Railway*, 402.
13. If the judge presiding at a trial in his charge to the jury makes an erroneous statement with regard to a certain portion of the evidence, and, upon his attention being called to the fact, announces that he changes his instructions and corrects the error, an exception to the erroneous statement thus afterward corrected must be overruled. *Ibid.*
14. In the absence of any statement to the contrary in a bill of exceptions, it is to be presumed that a colloquy, therein narrated, between the judge presiding at a trial before a jury and the counsel for one of the parties, which occurred immediately following the charge and referred to certain statements in the charge which in the course of the colloquy the judge corrected, was in the jury's presence and according to the usual course of jury trials. *Ibid.*
15. Where no question of pleading is expressly raised at a trial and the presiding judge rules that on all the evidence the action cannot be maintained and orders a verdict for the defendant, such ruling of itself raises no question of pleading, and if the case, which there is evidence to support, is substantially although imperfectly stated in the declaration, the sustaining of an exception by the plaintiff to the ruling of the judge will not be prevented by the imperfections in the declaration. *Barry v. Woodbury*, 592.

Practice, Civil (*continued*).

16. On the redirect examination of the plaintiff in an action of tort, against a railroad corporation under the employers' liability act, in regard to the duties which he was required to perform in the service of the defendant, if the witness is asked "What he was supposed to do," the use of this loose or objectionable phrase will not sustain an exception to the admission of the question against a general objection of the defendant, in the absence of any objection to the form of the question at the time it was asked. *Lury v. New York, New Haven, & Hartford Railroad*, 540.
 17. The declaration in an action of contract against two persons, a husband and wife, contained three counts, all alleged to be for the same cause of action. The evidence introduced at the trial would have supported a verdict against either the husband or the wife on either of the first two counts according to the view which the jury took of the facts; but on the third count the verdict could be against the husband only. At the close of the evidence, the wife asked for a ruling that "on all the evidence the plaintiff could not recover against" her. The request did not refer to any particular count. The ruling was refused and the jury were instructed that they could find against only one of the defendants. The jury found generally against the wife. *Held*, that a request for an instruction that the wife could not be held under the third count could not be raised for the first time after the general verdict because under the judge's charge it must be assumed that the verdict was returned upon the count or counts to which the evidence was applicable, and therefore that it could not have been upon the third count. *Reid v. Miller*, 80.
- As to entry of judgment after sustaining of exceptions, see *post*, 18-20.
- Exception to portion of charge of judge which was not sustained because, although it contained erroneous statement of law, excepting party was not harmed thereby, see *CONTRACT*, 15.

Entry of Judgment after sustaining of Exceptions.

18. In this case, although the defendant had not asked this court to order judgment in its favor in accordance with St. 1909, c. 236, upon the sustaining of exceptions by the defendant to a refusal of the trial judge to order a verdict in its favor at the close of all the evidence, this court, being of the opinion that the case came within the terms of that statute, ordered judgment to be entered for the defendant. *Cote v. D. W. Pingree Co.* 286.
19. Where at a trial under a declaration in contract or tort, the plaintiff upon the state of facts disclosed by the evidence could not recover upon any count of his declaration without showing fraud on the part of the defendant, and there was no evidence of such fraud to submit to the jury, but the presiding judge refused to order a verdict for the defendant and the jury returned a verdict for the plaintiff, upon an exception by the defendant to such refusal, this court under St. 1909, c. 236, ordered an entry in the trial court of judgment for the defendant. *Kiely v. Corbett*, 158.
20. Where a bill of exceptions of a defendant in an action by an employee against his employer to recover for personal injuries, in which the declaration originally contained six counts, some at common law and some under

R. L. c. 106, § 71, stated that at the close of all the evidence, after the counsel had conferred with the presiding judge, the judge at the request of the plaintiff's counsel and against the objection of the defendant allowed the plaintiff to strike out all but the first count of his declaration and to amend that count, and the plaintiff had a verdict, and where this court was of opinion that the issue on the common law count had been fully heard and tried and that the plaintiff could not recover at common law, but that the plaintiff might possibly have recovered under one of his counts under the statute, it was *held* that upon the record this court did not have the means of determining whether the circumstances, including the conference with the judge, were such that the plaintiff ought to be held to the election which he had made; and therefore the defendant's exceptions were sustained and the case was remanded to the Superior Court to ascertain whether, upon the facts that might be shown, justice required that the plaintiff should be bound by the election which he had made at the trial, or whether he should be allowed to amend his declaration by striking out the single count which was left in the declaration as amended and substituting therefor a count or counts under R. L. c. 106, § 71. *Greibenstein v. Stone & Webster Engineering Corp.* 431.

Rescript from Supreme Judicial Court.

Case where, at trial of action by employee against employer in which declaration contained counts under employers' liability acts and at common law and plaintiff elected to strike out all but common law count and received a verdict thereon, this court, upon deciding that there was no cause of action on common law count, nevertheless did not order judgment for defendant under St. 1909, c. 236, but in its rescript gave leave to Superior Court to permit plaintiff to amend declaration and proceed upon count under statute, see *ante*, 20.

Costs.

In action on replevin bond which contains no express provision therefor, plaintiff cannot recover expenses which he incurred as defendant in replevin suit beyond those allowed as taxable costs, see *REFLEVIN*, 8.

In Mechanic's Lien Proceedings.

See *MECHANIC'S LIEN*.

Mandamus.

Mandamus is proceeding at law, and not in equity, see *MANDAMUS*, 1. For other questions determined as to mandamus, see *CORPORATION*, 8.

Writ of Prohibition.

Writ of prohibition does not lie to correct errors of tribunal acting within its jurisdiction, see *WRIT OF PROHIBITION*, 1; *GUARDIAN*, 2.

Certiorari.

As to certiorari proceedings against railroad commissioners, see **RAILROAD COMMISSIONERS**, 1; **CERTIORARI**, 1-3.

PRACTICE, CRIMINAL.

Motions to Quash.

Motions to quash indictment for murder because of alleged insufficiency of particulars furnished in indictment and bills of particulars, which were held rightly to have been denied, see **HOMICIDE**, 1-4.

Conduct of Trial.

Opening statement to jury.

Proper action of judge, presiding at trial of indictment for murder, in refusing to strike out opening statement of district attorney, and in stating to jury that opening was not evidence, see **HOMICIDE**, 16.

Requests and rulings.

1. In a criminal case where the Commonwealth, for the purpose of showing a motive of the defendant for the commission of the crime, introduces evidence which except to show such motive would be incompetent, if the defendant wishes to have the jury instructed that the evidence is competent only for the limited purpose for which it has been admitted, he must ask for such an instruction. If he fails to do so, he afterwards cannot complain because no such instruction limiting the effect of the evidence was given. *Commonwealth v. Rivet*, 464.

Appeal.

2. The right of appeal in a criminal case in a police, district or municipal court is only from the sentence after conviction. *Renado v. Lummas*, 155.
3. One, who on a January 6 was convicted in a police court of assault and battery and was sentenced to pay a fine of \$10 and to stand committed until it was paid, when informed of his right to take an appeal, stated in open court that he did not wish to appeal and waived his right to appeal, and requested a suspension of the execution of the sentence. Thereupon under St. 1905, c. 338, amending R. L. c. 220, § 1, the judge ordered that the execution of the sentence be suspended and that the defendant be placed on probation until the sitting of the court on January 12 upon the condition that the fine should be paid during the period of probation. On January 12 it appeared that the fine still was unpaid. The defendant then for the first time claimed an appeal from the sentence but the judge refused to allow it. *Held*, that the defendant's appeal came too late. *Ibid*.
4. Where, after a conviction in a criminal case in a police, district or municipal court and a sentence to pay a fine of \$10 and to stand committed until the fine is paid, the judge finds that the defendant is unable to pay the

fine when it is imposed, and probably will not default, and that it will not be detrimental to the interests of the public to suspend the execution of the sentence and place the defendant on probation, and therefore in accordance with St. 1905, c. 838, amending R. L. c. 220, § 1, suspends the sentence for six days on condition that the fine shall be paid meanwhile, and at the end of such six days, on representations of the probation officer, the judge finds that the fine has not been paid and that the defendant is able to pay it, and thereupon revokes the suspension of the execution of the sentence, the defendant has no right of appeal from such finding and revocation. *Renado v. Lummus*, 155.

Suspension of Sentence.

There is no appeal from order of police, district or municipal court revoking suspension of sentence granted under St. 1905, c. 838, amending R. L. c. 220, § 1, see *ante*, 4.

PROBATE COURT.

Exceptions at Trial on Appeal.

1. Where an exception was taken by the contestant of a will to an instruction given to the jury by the justice who presided at the trial of issues framed for the jury upon a probate appeal, on the ground that the instruction amounted to a statement "that undue influence must savor of fraud," and the bill of exceptions merely states that "there was evidence tending to show that the execution of the will was procured through the fraud or undue influence of" a certain person, and there is no further description of the evidence, the excepting party has not shown that he was aggrieved by the instruction, whether as an abstract proposition it was correct or not, because all the evidence may have related to undue influence exerted by fraudulent devices, in which case the instruction would be exactly appropriate as applied to the facts in evidence. *Whitcomb v. Whitcomb*, 810.

PUBLIC OFFICERS.

1. A city is not liable to a person assaulted and robbed by police officers appointed by it. *Hathaway v. Everett*, 246.
2. A city is not liable in an action of tort to a person compelled to pay excessive taxes by reason of an assessment made fraudulently by its assessors. *Ibid.*

Negligence of county commissioners, which was held to have occurred while they were acting as public officers, and for which therefore county was not liable, see COUNTY COMMISSIONERS, 8.

County commissioners, in employing architect to draw plans for construction or alteration of proposed county buildings, act as board of statutory officers whose power to bind county depends upon authority conferred by Legislature, see COUNTY COMMISSIONERS, 1.

For application of above principle, see COUNTY COMMISSIONERS, 2-7, 9.

QUASI CORPORATION.

Vote of watch, fire or improvement district to employ person at certain salary as watchman, which was ineffectual because at time vote was passed there was no money in treasury of district and none was appropriated afterward for payment of watchman's salary, see *CONTRACT*, 9.

RAILROAD.

Action against railroad company by employee to recover for personal injuries, see *NEGLIGENCE*, 8, 9.

Action against railroad company to recover for death of employee of city working in railroad yard, see *NEGLIGENCE*, 56.

RAILROAD COMMISSIONERS.

1. Under St. 1906, c. 516, § 5, which provides that the directors named in a written agreement of association for the formation of an electric railroad company may apply to the board of railroad commissioners for a certificate that public convenience and necessity require the construction of a railroad as proposed in such agreement, and further provides that, "if said board refuses to issue such a certificate, no further proceedings shall be had, but the application may be renewed after one year from the date of such refusal," the dismissal of such an application without prejudice at the request of the applicants is not such a refusal, nor is the dismissal of an application for an informality upon a like request, the word "refusal" in the statute meaning an adjudication against the application founded upon a determination of the question whether in the public interest it ought or ought not to be granted; and after the dismissal of such an application for an informality at the request of the applicants, the application may be renewed in proper form before the expiration of a year. *Weston v. Railroad Commissioners*, 94.

Various questions which were determined in petition for writs of certiorari against the railroad commissioners regarding their action in entertaining such new petitions, see *CERTIORARI*, 1-3.

RECEIVER.

Receivership proceedings as to insolvent incorporated social club, see *EQUITY JURISDICTION*, 13-15; *CORPORATION*, 1.

Certain questions regarding liability of policy holders for premiums, which arose in receivership proceedings with regard to mutual marine insurance company, see *INSURANCE*, 4-6.

RECORD.

Only place for making record or for keeping record of case in Superior Court is in clerk's office, except as such records may be made or kept for time being in place where court is sitting, see *CLERK OF COURTS*, 1.

Application of foregoing principle in determining that papers to perfect appeal from Land Court, given to clerk of Superior Court at his home after office hours, did not perfect appeal, see LAND COURT, 4.

REGISTRATION.

Registration of automobiles, see AUTOMOBILE, 1-4.

Registration of title to land, see LAND COURT.

REPLEVIN.

1. All the damages up to the time of judgment, which the defendant in a replevin suit in case he is successful may recover for the taking and detention of the replevied property, including interest upon the value of the property, if such interest is taken to be the damages for the detention, and also including the interest at the rate of twelve per cent allowed by R. L. c. 190, § 11, in case at the time the goods were replevied they were under attachment and the service of an execution is thereby delayed, should be assessed in the replevin suit, and if such damages are not included in the judgment in the replevin suit, they cannot be recovered at all. *Maguire v. Pan-American Amusement Co.* 64.
2. In an action upon a replevin bond, the plaintiff cannot recover interest upon the value of the property detained for a period previous to the judgment in the replevin suit. *Ibid.*
3. In an action upon a replevin bond, the condition in which is that the obligor "shall prosecute said action of replevin to final judgment, and shall pay such damages and costs as the said [defendant in replevin] shall recover against [the obligor], and shall also return the property replevied, in case such shall be the final judgment," there can be no recovery for the expenses, including counsel fees, which the defendant in the replevin suit was obliged to incur in defense of that suit and in the prosecution of the suit upon the bond, both because the bond includes no provision for the payment of such expenses, and because the taxable costs which are recovered in such cases are in the contemplation of the law a full indemnity for all the expenses incurred in defense and in prosecution. *Ibid.*
4. In an action upon a replevin bond, the defendant, who was the plaintiff in the replevin suit, is not estopped to prove that the value of the goods replevied was less than \$5,000 by the facts that the replevin writ contained an order that the officer should deliver the replevied property to the plaintiff named in the writ if the plaintiff "shall give bond . . . in the sum of \$10,000, being twice the value of" the property replevied, and the fact that such bond for \$10,000 was given and accepted by the officer who served the writ and was delivered to the defendant, such recitals being evidence but not conclusive evidence. *Ibid.*
5. In an action upon a replevin bond where it appears that the defendant, who was the plaintiff in the replevin suit, has failed to return the property which he seized by virtue of the replevin writ and which the judgment in the replevin suit directed him to return, the plaintiff is entitled to recover, besides the amounts awarded to him as damages by the judgment in the

replevin suit and interest thereon at six per cent from the date of such judgment, the fair market value of the property in as good order and condition as it was at the date of the final judgment in the replevin suit, plus interest on such amount at the rate of six per cent. *Maguire v. Pan-American Amusement Co.* 64.

RES IPSA LOQUITUR.

See NEGLIGENCE, 27, 50, 64.

RES JUDICATA.

See EQUITY JURISDICTION, 1, 2.

RIOT.

1. To make a city liable in an action of tort for property destroyed or injured by persons riotously assembled, the action must be brought under R. L. c. 211, § 8. *Hathaway v. Everett*, 246.

SALE.

Conditional.

1. The owner of certain chattels made with one desiring to purchase them an agreement in writing whereby the chattels were to be delivered to the prospective purchaser, the title remaining in the vendor "until the same shall have been fully paid for," the vendee to have the use of them meanwhile and to care for them and keep them in repair, to give to the vendor access to them at any time for purposes of inspection and repair but not to permit any one else to use them, to keep them insured for the vendor's benefit, and to pay a certain sum down and certain other sums making up the balance of the purchase price with interest in quarterly instalments. It also was provided that the vendee should give certain notes corresponding in amount and times of payment and rate of interest to the quarterly payments to be made by him, "as collateral to the payment for said chattels," and that "on the payment of any one of the said notes the instalment corresponding thereto shall be deemed paid, and the said" vendor is "at liberty to dispose of any or all of said notes before or after maturity." On full performance of the agreement, the title to the chattels was to vest in the vendee, but "on failure" by the vendee "to keep the terms" of the agreement, the vendee was to give the vendor access to the chattels and to make no opposition to a removal of them. After having failed to pay several of the instalments, the vendee assigned his rights under the agreement to one who knew of its terms and to whom, through a third person, he also conveyed and gave possession of the premises where the chattels were. The vendor, while still retaining possession of the vendee's notes, replevied the chattels, and the vendee's assignee brought an action of tort or contract against the vendor, contending that the taking was wrongful. *Held*, that the agreement could not be said to be in viola-

tion of morality or against public policy, that, the notes being given "as collateral," the vendor did not have to deliver them up or rescind the contract before taking possession of the chattels, and that the taking, having been made after the vendee had broken the terms of the contract, was lawful. *Hoe v. Rex Manuf. Co.* 214.

Delivery.

If at time of sale no agreement is made to contrary, it is sufficient if goods sold are ready at vendor's place of business at appointed time; but statement in charge of judge at trial not strictly in accordance with above proposition was held under circumstances not to have harmed excepting party, see **CONTRACT**, 15.

Premature delivery of goods by vendor to purchaser was held not to operate to prejudice of vendor under circumstances, see **CONTRACT**, 13.

Rescission.

Action on contract for sale of coal, involving questions whether rescission by purchaser was justified, whether proposal by purchaser to rescind was acquiesced in by vendor, and what was proper rule of damages, see **CONTRACT**, 17, 18; **DAMAGES**, 1.

For purpose of assessing damages in suit in equity to rescind for fraud sale of shares of capital stock of corporation, where defendant had disposed of stock to *bona fide* purchaser for value before bringing of suit, value of stock at time when defendant procured stock from plaintiff should be taken, see **DAMAGES**, 4.

Of Fixtures.

Sale by owner of real estate of fixtures thereon gives purchaser license to go upon real estate to remove them, see **CONTRACT**, 6.

SET-OFF.

Counter claim or claim in set-off of acceptor against drawer of foreign bill of exchange cannot be set up in defense of action by holder in due course against acceptor, see **BILLS AND NOTES**, 4.

SEWER.

Liability of Commonwealth for alleged breaches of agreements and of covenants in deed by harbor and land commissioners of portions of Commonwealth Flats, due to order made by city of Boston before deed, for construction of sewer, see **HARBOR AND LAND COMMISSIONERS**, 1; **DEED**, 2, 3; **CONTRACT**, 12; **STATUTE**, 1.

STATUTE.

Unconstitutionality of Part of Statute.

1. There may be a question whether St. 1892, c. 402, § 4, which provides that when an assessment for the construction of a sewer in the city of

Statute (continued).

Boston "is made for a parcel of land for which the owner is by law exempt from being taxed," the collection of the assessment shall be suspended, but, "after the day on which the parcel ceases to be owned by a person or corporation so exempt," the assessment "shall be collected as if that day were the date of the passage of the . . . order for making the sewer," should be treated as separable from other sections of the same statute which have been declared unconstitutional, per KNOWLTON, C. J. *Cotting v. Commonwealth*, 523.

Construction.

Statutes regarding use of motor vehicles which were construed so as not to abrogate, with regard to automobiles, rules of street commissioners of Boston, adopted under authority of previous statute, see *AUTOMOBILE*, 2, 3.

Whether person riding as guest in buggy by side of one driving across funeral procession in violation of R. L. c. 212, could recover from employer of driver for personal injuries caused by negligence of such driver, was not decided, see *FUNERAL*, 1.

Amendment.

Statute, which attempted to extend time within which land could be redeemed from tax sales already made under R. L. c. 13, §§ 58, 75, would be unconstitutional, see *CONSTITUTIONAL LAW*, 1; consequent construction of St. 1905, c. 325, § 3, amending R. L. c. 13, § 75, so that it applied only to sales made after its passage, see *EQUITY JURISDICTION*, 5.

Repeal.

Effect of repeal of repealing statute before latter went into effect, and application of principle to statutes relating to wills of married women, see *WILL*, 4.

STATUTE OF FRAUDS.

See *FRAUDS*, *STATUTE OF*.

STATUTE OF LIMITATIONS.

See *LIMITATIONS*, *STATUTE OF*.

STATUTES CITED AND EXPOUNDED.

See page 757.

STREET COMMISSIONERS.

Statutes regarding use of motor vehicles which were construed so as not to abrogate, with regard to automobiles, rules of street commissioners of Boston, adopted under authority of previous statute, see *AUTOMOBILE*, 2, 3.

STREET RAILWAY.

1. In an action against a street railway corporation for personal injuries alleged to have been sustained while the plaintiff was boarding a car of the defendant as a passenger, if there is evidence tending to show that at a signal from the plaintiff the car had come to a stop at a usual stopping place, and that when the accident occurred the plaintiff was in the act of entering the car with one foot upon the step without any objection or warning from the conductor, who was standing in the doorway which the plaintiff was about to enter, a finding is warranted that the plaintiff was a passenger when he received his injuries. *Carter v. Boston & Northern Street Railway*, 21.
 2. In the use of the kind of street railway car which is called semi-convertible and in which the doors are opened and shut by a device operated by the motorman, it is not necessary that the door to admit passengers should be entirely open in order that an assent to the entrance of a passenger may be inferred from the silence of the conductor who is standing in the doorway. It is enough to warrant such an inference of assent if the door is open so far that the person proposing to enter as a passenger is justified in believing that the opening is intended to afford him an opportunity to enter and no objection to his doing so is made by the conductor. *Ibid.*
- Action by such passenger for injuries resulting from further opening of door, see NEGLIGENCE, 39-41.
- Relative rights on highway of street railway company in operation of its cars and of other travellers, see NEGLIGENCE, 59.
- Actions against street railway companies for personal injuries or death alleged to have been caused by negligence or gross negligence of themselves or of their servants or agents, see NEGLIGENCE, 28-50.

SUPERIOR COURT.

- Effect of order as to entry of exceptions in Supreme Judicial Court, see PRACTICE, CIVIL, 11.
- Only place for making record or for keeping record of case in Superior Court is in clerk's office, except as such records may be made or kept for time being in place where court is sitting, see CLERK OF COURTS, 1.
- Application of foregoing principle in determining that papers to perfect appeal from Land Court, given to clerk of Superior Court at his home after office hours, did not perfect appeal, see LAND COURT, 4.
- Superior Court has no power to abate tax, on appeal from refusal of assessors to do so, if required list of taxable property was not brought in to assessors as required by statute, unless Superior Court finds or assessors have found that there was good cause for delay, see TAX, 8.

SUPREME JUDICIAL COURT.

- Order of judgment for excepting party under St. 1909, c. 236, see PRACTICE, CIVIL, 18-20.

TAX.

Assessment.

City is not liable in tort to person compelled to pay taxes which were excessive by reason of assessment fraudulently made by its assessors, see PUBLIC OFFICERS, 2.

Sewer Assessment.

Liability of Commonwealth for alleged breaches of agreements and of covenants in deed by harbor and land commissioners of portions of Commonwealth Flats, due to order made by city of Boston before deed, for construction of sewer, see HARBOR AND LAND COMMISSIONERS, 1; DEED, 2, 3; CONTRACT, 12; STATUTE, 1.

On Inheritances.

1. The provisions of a trust agreement under which a trustee received certain sums of money from a settlor were that the income was to be paid to a beneficiary as often as dividends became payable thereon, that at the end of five years the settlor could withdraw the whole trust fund by giving the trustee a six month's notice in writing and that the trustee could pay off the trust fund by giving the settlor such notice, that if no such notice was given the fund should remain with the trustee for another period of five years, that, in the case of the death of the settlor before the termination of a period of five years during which the trust was in force, the principal and unpaid income were to be paid to the beneficiary in sixty days after the expiration of the current period of five years. The settlor died while the trust was in force, and by a bill in equity for instructions, brought by the trustee, and by an information filed by the Attorney General at the relation of the Treasurer and Receiver General, the question was raised whether the principal fund was subject to an inheritance tax under R. L. c. 15, § 1, as amended by Sts. 1905, c. 470; 1906, c. 436. *Held*, that the gift of the principal was "made or intended to take effect in possession or enjoyment after the death of the grantor," and therefore that an inheritance tax should be paid as of a date thirty days after the expiration of the current period of five years referred to in the trust agreement. *New England Trust Co. v. Abbott*, 279.
2. Under R. L. c. 15, § 1, as amended by St. 1905, c. 470, and St. 1906, c. 436, defining the kinds of property which are subject to a legacy and succession tax, a legacy to the trustees under a will for the maintenance of a free Latin School for the education of youths in a certain province of the Empire of Turkey is not exempt from the tax, although the trustees are authorized by the terms of the legacy to form a corporation to maintain such a school if it seems wise to them to do so, and after the death of the testator exercise this authority by forming a charitable corporation under R. L. c. 125, for the purpose of carrying out this clause of the will. Whether a legacy for the same purpose would be exempt from the tax if made to a charitable corporation in existence in this Commonwealth at

the time of the death of the testator, here was not considered. *Pierce v. Stevens*, 219.

Exemption.

3. The charter of a corporation stated that it was organized "for the purpose of founding a hospital or charitable asylum . . . for the care and relief of indigent or other sick or infirm persons, at which institution may be received also patients and patrons who are able to and who pay for the benefits therein received and which institution shall devote the funds and property acquired . . . exclusively to maintain itself, improving its conditions and facilities, extending its benefits and usefulness and facilitating and promoting its purposes by such sanitary, dietetic, hygienic and philanthropic reforms and efforts as are germane or auxiliary thereto. All of its said purposes being undenominational, non-sectarian, philanthropic, humanitarian, charitable and benevolent and in no manner directly or indirectly for profit or dividend paying to any one." The corporation, from contributions, supplemented by loans and mortgages from friends, purchased land, built thereon several buildings and conducted a modern sanitarium with physicians, nurses and attendants. Besides the sources above mentioned, the expense of maintenance was paid by sums paid by various patients and others who came to visit patients. During the year 1907, one and seven one hundredths per cent of those who received accommodations were free patients, four and seven one thousandths per cent were part paying patients, and the rest paid the full rate named in an advertised schedule which ranged from \$12 to \$35 per week. None of the officers of the corporation, except the treasurer, who also was the manager, received any remuneration. Free patients, before they were admitted, had to be passed upon by a committee as to their character and financial standing. *Held*, that the personal property and real estate of the corporation was exempt from taxation under the provisions of R. L. c. 12, § 5, cl. 3, which exempts from taxation the personal property of benevolent and charitable institutions and such of its real estate as is owned and occupied by it for the purposes for which it was incorporated. *New England Sanitarium v. Stoneham*, 335.

Fund left in trust for use in founding charitable school in foreign country, where no corporation had been formed before testator's death, is not exempt from tax on inheritances, see *ante*, 2.

Abatement.

4. Under R. L. c. 12, § 78, St. 1909, c. 490, Part I. § 77, a complaint or petition entered in the Superior Court by a person aggrieved by the refusal of the assessors of a city or town to abate a tax is an appeal, and must be entered in the Superior Court on the first return day after the expiration of thirty days from the giving by the assessors of the written notice of their decision required by a preceding section of the statute. By R. L. c. 167, § 24, the return day in the Superior Court is the first Monday of every month, and the Superior Court has no jurisdiction of such an appeal first attempted to be entered on the Thursday following such first Monday

Tax (*continued*).

- of the month next after the expiration of such thirty days. *Cheney v. Assessors of Dover*, 501.
5. [Stricken out.]
 6. History of legislation as to the requirement that a taxpayer shall furnish to the assessors a list of his taxable property before the day specified in the notice from the assessors, as a condition precedent to a complaint appealing from a refusal of the assessors to abate a tax on such property, recounted by HAMMOND, J. *Sears v. Assessors of Nahant*, 558.
 7. Remark of METCALF, J., in *Winnisimmet Co. v. Assessors of Chelsea*, 6 Cush. 477, 481, that "by the provincial statutes . . . a party, aggrieved at the sum apportioned on him by assessors, and being refused an abatement by them, might appeal to the sessions for an abatement, in all cases, as a matter of right," declared to be erroneous so far at least as respects the law after 1735. Per HAMMOND, J. *Ibid*.
 8. Under R. L. c. 12, §§ 77, 78, on an appeal from the refusal of the assessors of a town or city to abate a tax, the Superior Court has no power to abate the tax where the required list of taxable property was not brought in within the time specified in the notice given by the assessors, unless the assessors have found or the Superior Court finds that there was good cause for the delay. *Ibid*.

Redemption.

9. *It seems*, that land in this Commonwealth, undertaken to be devised by the will of one, who died domiciled in another State and whose will has been proved only in that State, may be treated as intestate property in a suit to redeem it from a tax sale. *Solis v. Williams*, 350.
- Statute, which attempted to extend time within which land could be redeemed from tax sales already made under R. L. c. 13, §§ 58, 75, would be unconstitutional, see CONSTITUTIONAL LAW, 1.

Tax Deed.

10. A void tax deed is not *prima facie* evidence of title. *Johnson v. Scott*, 294.

TELEGRAPH COMPANY.

1. A telegraph company is engaged in a *quasi* public employment, to be carried on for the accommodation of the community with a view to the general benefit, and has no right to refuse to receive a proper message for whose transmission payment is tendered. *Vermilye v. Postal Telegraph Cable Co.* 598.
2. A telegraph company, which intentionally and unreasonably refuses to transmit, for one proffering it for transmission together with the usual fee therefor, a message which has affixed thereto by means of a sticker a notice informing the company as to the nature of the message and its importance to the sender from a financial point of view in order that the

nature and particulars of the undertaking of the company may be understood by it, renders itself liable to pay to the sender of the message the penalty provided by R. L. c. 122, §§ 9, 10, for a wilful refusal to transmit a message faithfully and impartially, such intentional and unreasonable refusal being wilful and within the meaning of the statute. *Vermilye v. Postal Telegraph Cable Co.* 598.

8. The rule stated in *Wheelock v. Postal Telegraph Cable Co.* 197 Mass. 119 is that the damages to be recovered for a breach of contract in transmitting a telegraphic message are such as reasonably might have been expected to be within the contemplation of the sender and of the telegraph company by reason of the contents of the message or of the circumstances attending the transaction when the contract for its transmission was made. For his protection under this rule, one desiring to send a business telegraphic message from Boston to New York pasted thereon, in a position where its presence had no tendency to confuse the telegraph operator and did not increase the probability of error or delay in the transmission of the message, a small sticker containing the following: "Notice is hereby given that this is a business message, and that failure to deliver it promptly and correctly is likely to cause the sender financial loss. Further particulars will be furnished if desired on application to the sender at" an address given. The message and the sticker were upon an ordinary blank furnished by the company, on the back of which were printed certain "terms and conditions," among which it was stipulated, "It is agreed between the sender of the message written on the face hereof and the . . . company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, beyond the amount received for sending the same." An extra charge would be made for sending a repeated message. The sender tendered to the company the message with the sticker thereon and with the fee for the sending of it unrepeated. The company refused absolutely to transmit the message while it was accompanied with the notice. *Held*, that the absolute refusal of the defendant to receive and send the message was unreasonable, and that the company was liable either at common law or under R. L. c. 122, §§ 9, 11, for damages resulting from such refusal. *Ibid*.

TOWNS.

See MUNICIPAL CORPORATIONS.

TRESPASS.

1. At the trial of an action of tort with a declaration containing three counts, the first for the conversion of the furniture and provisions in a restaurant, the second for the conversion of "divers bank notes and coins to the value of \$35," and the third for trespass in wrongfully excluding the plaintiff from his restaurant, there was evidence tending to show that the defendant, who was a constable, entered the plaintiff's restaurant to

Trespass (*continued*).

make an attachment under a writ and placed a keeper in charge, and that then, the plaintiff desiring to continue the business, it was arranged that the business should not be interrupted, but that the money taken in should be paid to the defendant; that, when the usual time for closing the store at night arrived, the defendant told the plaintiff that he would have to lock up the store himself unless the plaintiff was willing to surrender to him possession thereof and to give to him the keys; that the plaintiff thereupon gave the keys to the defendant; that at the usual opening time the next morning the defendant opened the store and left his keeper in charge; that during the day, because the defendant insisted that the waitresses pay to him money which they received, they all departed and the restaurant was left in the sole charge of the defendant; that at closing time the defendant, still retaining possession of the plaintiff's keys, against the objection of the plaintiff fastened the door with a padlock and staple and put a sign upon it, saying, "Closed. M., constable"; that the premises remained in that condition until, five days later, the plaintiff gave a bond dissolving the attachment, whereupon the defendant returned to the plaintiff the keys of the store, but did not return \$27 which he had taken possession of. *Held*, that upon the evidence the jury properly might have found that the plaintiff surrendered the premises to the defendant only upon condition that the restaurant should be kept open during business hours, and therefore that the defendant properly might have been found to have been a trespasser *ab initio* and to be liable under all of the counts of the declaration. *Morrin v. Manning*, 205.

Woman attempting to enter street railway car on wrong side was held, in action against street railway company for injuries resulting from conductor's starting car while she was so doing, under circumstances not to be trespasser as matter of law, see NEGLIGENCE, 33.

But, in same case, jury should have been instructed that, if they found that plaintiff in so entering car was acting unlawfully, she must show that her injury was caused by wilful misconduct or wanton and reckless conduct on part of conductor in order to recover, see NEGLIGENCE, 33, 38.

Neither person riding in, nor owner of automobile being driven upon highway without having complied with registration laws can recover for injury or damage resulting from automobile running into defective portion of highway, see WAY, 3, 5; AUTOMOBILE, 4.

TROVER.

Tort in nature of trover will lie for conversion of money, see CONVERSION, 1.

TRUST.

What constitutes.

1. In a suit in equity against one brother in a family by all of his nine brothers and sisters, in which the plaintiffs sought to have the defendant declared trustee for himself and them of a burial lot, which he had purchased and the title to which he had taken in his own name, the following

facts appeared: In 1891 the plaintiffs and the defendant and their father were living together and jointly contributing to the family support. In that year a sister died, and, the family then being without a burial lot and the defendant not at that time having contributed his full share to the family expenses, it was agreed among them that the defendant should pay for a lot which they all selected and that the deed should be made to the father. The defendant paid for the lot, but the deed conveyed the lot to him individually. The making of the deed to the defendant was accidental, and the defendant acted in good faith in the matter. The deed was kept unconcealed in a desk used by and equally accessible to all members of the family. The father never learned of the state of the title, and died in 1895. The plaintiffs learned of it in 1896 or 1897 and then questioned the defendant, who told them that it was all right, that it did not matter, and used other similar expressions which they regarded as amounting to an oral promise to hold the lot for their benefit as well as for his own. In the meantime the body of the mother had been moved from a former home of the family and interred in the lot and another sister had died and had been buried there, as well as the father; and from an annuity provided by insurance of the sister a family monument had been erected upon the lot. In 1906, dissensions having arisen between the defendant and the plaintiffs, he asserted an absolute right in the lot, and the plaintiffs at once brought this suit. *Held*, that, there being an entire absence of a written memorandum of a trust, such as is required by R. L. c. 74, § 1, cl. 4, and by R. L. c. 147, § 1, the suit could not be maintained. *Tourtillotte v. Tourtillotte*, 547.

Certain facts which were held not to constitute constructive trust, see AGENCY, 5.

Construction.

Case involving construction of trust created by will with regard to nature of interest of one of beneficiaries in certain funds, where it was held that in one of funds beneficiary had interest which could be reached and sold by creditor as equitable asset, and any surplus of proceeds after sale of which and payment of creditor would pass to trustee in bankruptcy under circumstances; while interest in other funds was not of such nature, see EQUITY JURISDICTION, 11, 12; BANKRUPTCY, 1.

Trust Funds mingled by Trustee with Personal Funds.

2. When a trustee deposits in a bank in one fund, without any earmark, money of his own and money which he holds in trust for another, the beneficiary of the trust, although he is wholly unable to identify his money in the bank, may at his election follow the mixed fund which thus has been created by the trustee and enforce a claim or charge upon it for his indemnity. *Hewitt v. Hayes*, 356.
3. In a suit in equity by a beneficiary to follow money of the plaintiff which a trustee has mingled with money of his own in a deposit in a bank, it will be presumed in favor of the plaintiff that, so long as any of the trustee's own

money remained in the fund available for use, withdrawals made by the trustee by check from the mixed fund were made from the trustee's own part of the fund and not from the money of the trust. *Hewitt v. Hayes*, 356.

4. Where one who is a trustee for a number of separate beneficiaries mingles their money with money of his own and deposits the whole in one fund in a bank, and then is adjudged a bankrupt, a beneficiary whose money is contained in the fund can maintain a suit in equity to charge this particular mixed fund with his claim for indemnity, or he may prove his claim in bankruptcy against the whole estate of the bankrupt trustee in the hands of his trustee in bankruptcy, but he cannot do both, because the remedies are inconsistent; and, if with a full knowledge of all the circumstances he proves his claim in bankruptcy, this is an election of remedy which is a bar to a suit in equity by him to have his claim declared to be a charge upon the specific fund deposited in the bank. Under what circumstances such an election is final, and in what cases a beneficiary, after proving his claim in bankruptcy, may be allowed to expunge such proof and reassert his equitable rights, here was not considered. *Ibid*.
5. In a suit in equity by the trustee in bankruptcy of one of the two partners of an insolvent firm against the executor of the will of the other partner, who died insolvent, to compel the defendant to turn over to the plaintiff a specific fund in the possession of the defendant as executor, where all persons seeking to subject the fund to liens or charges were admitted to the suit as intervening claimants, it appeared that the fund in question was deposited in a bank and was a continuation of a general bank account of the insolvent firm which afterwards stood in the single name of the defendant's testator, and that in it were mingled in one common fund the money of the firm and of the various claimants to whom the firm and the defendant's testator stood in a fiduciary relation. It further appeared that on a certain date the account had been overdrawn by more than \$2,000. In determining the respective rights of those of the claimants who were entitled to pursue this fund, it was *held*, that none of the claimants could have a charge upon the fund for any deposit made before the date when the account was overdrawn, and that the amount for which any of them was entitled to charge the fund after that time must be determined by taking the deposit first thereafter made of his money and adding to it the amount of any later deposits of his money; but that the amount must be diminished by the amount of any withdrawals by the defendant's testator from the portion of the fund which was subject to the charge in favor of such claimant; that withdrawals made by the defendant's testator for his own use or that of his firm must be treated as made from that part of the fund which belonged to him or them so far as that was practicable; but that, when this could not be done, the withdrawals, as among those claimants who were entitled to charge the fund, must be charged against the deposits in the order of their respective dates, the rule that the first withdrawals should be applied to the first deposits being followed among the claimants, although not followed between them and the defendant's testator, who was their trustee; that, when the amount subject to a charge in favor of a claimant had been diminished to any extent by

withdrawals, it was not to be increased by any subsequent deposit made by the defendant's testator of money which was not shown to have been the money of that particular claimant; and that no claimant was to be allowed a charge upon any part of the fund which, under the rules stated above, was subject to a charge in favor of a claimant prior to him in time; that, if the total amount that could be held by all the claimants who were entitled to charges upon the fund, when determined as above, exceeded the amount of the fund, the fund was to be distributed among them in proportion to the amounts of their respective charges; and that, if the total amount of the charges was less than the amount of the fund, the claimants entitled to the charges were to receive the amounts of their respective charges in full, and the residue of the fund was to be paid to the plaintiff as trustee in bankruptcy. *Hewitt v. Hayes*, 356.

Constructive.

Broker, who was employed to procure loan for owner of land subject to mortgage and after honest attempt so to do, was unsuccessful, does not become constructive trustee of land if thereafter he purchases land at sale in foreclosure of mortgage, see AGENCY, 5.

Statutory Requirement as to Memorandum.

Under circumstances, defendant did not need to set up defense that there was no memorandum of alleged trust, in answer to bill in equity to enforce such trust, in order to rely on it, see EQUITY PLEADING AND PRACTICE, 8.

Inheritance Tax.

Gift in trust which was held to be subject to inheritance tax because it was made or intended to take effect in possession or enjoyment after the death of the grantor, see TAX, 1.

UNDUE INFLUENCE.

1. Undue influence sufficient to invalidate a will may be exerted upon the testator either by fraudulent means or devices or by physical or moral coercion practised upon him without any actual deception. *Whitcomb v. Whitcomb*, 310.
2. Undue influence sufficient to invalidate a will, even when it does not involve active deception or fraud and consists merely of a dominating and controlling influence exerted over the mind and will of the testator by means of excessive importunity or the mastery which one mind may sometimes gain over a weaker one, is a fraud upon the testator in causing him to make a disposition of his property different from that which he would have made voluntarily, and also is a fraud upon his heirs or those whom he otherwise would have made the subjects of his bounty, and in this sense, when speaking of undue influence which paralyzes the will of a testator and substitutes for his will the will of the person who exercises the influence, it is correct to say that an influence to be undue must partake of the nature of fraud. *Ibid.*

Undue Influence (continued).

Action of contract based on consideration of forbearance from litigating claim that will of father of plaintiff and defendant was procured by undue influence of defendant, wherein it was held that contract was supported by good consideration and that fact that defendant was executor and had promised to pay plaintiff amount of general legacy made to her in will, estate being insolvent, did not cause contract to be barred by R. L. c. 74, § 1, cl. 1, see CONTRACT, 8-5, 10; FRAUDS, STATUTE OF, 1.

USAGE.

See CUSTOM.

VENDOR AND PURCHASER.

See SALE.

VERDICT.

See PRACTICE, CIVIL, 4, 5, 10, 17; NEGLIGENCE, 38.

WAGES.

What is included in words, "future wages," in St. 1906, c. 390, see ASSIGNMENT, 3, 4.

WARRANTY.

Breach of covenants of warranty in deed, see DEED, 2, 3.

Power of harbor and land commissioners to make such covenant, see HARBOR AND LAND COMMISSIONERS, 1.

WATCH DISTRICT.

Vote of watch district to employ person at certain salary as watchman, which was ineffectual because at time vote was passed there was no money in treasury of district, and none was appropriated afterward for payment of watchman's salary, see CONTRACT, 9.

WAY.

Public.

Notice to municipality of defect.

1. In an action under R. L. c. 51, § 18, against a town by one, who while travelling upon a public highway received personal injuries by reason of his running into a barrier negligently left in the highway, if it appears that the barrier was so left by one who was engaged in the work of resurfacing the street under a superintendent of streets appointed by the town's selectmen pursuant to R. L. c. 25, §§ 85, 86, such negligent act of the employee must be deemed to have been the town's own act, so that no further

notice to the town of the existence of the defect need be proved. *Burditt v. Winchester*, 498.

2. In an action under R. L. c. 51, § 18, against a town by one, who while travelling upon a public highway received personal injuries by reason of his running into an unlighted barrier in the highway at about seven o'clock in the evening of an October 2, it appeared that the barrier had been used by employees of the defendant during the day to warn travellers that a steam roller was at work upon the street, that the workmen ceased work about two hours before the accident and that the barrier should then have been removed, that the street was a main thoroughfare of the town, was macadamized, was lighted with electric lights and had an electric railway upon it, that there were houses in the vicinity, and that the place of the accident was a mile and a half from the centre of the town. *Held*, that the jury would have been warranted in finding that the town authorities in the exercise of reasonable care should have known of the defect. *Ibid*.

Injury from defect.

3. A person who is being driven upon a highway in an automobile which is not registered as required by law is not a traveller lawfully upon the way within the meaning of the highway act, and if he is injured by reason of a defect in the highway he cannot recover from the city or town maintaining it. *Feeley v. Melrose*, 329.
 4. No action can be maintained against a city for injuries received, while being driven in an automobile, by reason of a defect in a highway of the defendant, if the negligence of the driver of the automobile contributed to the accident, regardless of the relation of the plaintiff to the driver and of any question of imputed negligence; because in such a case the defect in the way could not be found to be the sole cause of the injury, which under our decisions is necessary for a recovery under the highway act. The same rule applies to an action by the owner of the automobile for injury to his property. *Ibid*.
- But, where actions against city by person, who was being driven in such automobile by servant of owner, and by owner of automobile are tried together, if verdict is returned for owner in his action, defendant was not harmed by failure of judge to instruct jury in accordance with foregoing principle, or in accordance with principle that there could be no recovery if injury was caused by defect in automobile, since, to find for owner, jury must have been of opinion that neither negligence of driver of automobile nor defect in automobile contributed to cause accident, see *PRACTICE*, CIVIL, 4, 5.
5. In actions against a city, for personal injuries received by reason of a defect in a highway of the defendant while the plaintiff was being driven thereon in an automobile, and by the owner of the automobile for injury to his property, where the defense relied upon is that the automobile was not registered and numbered as required by law and therefore was upon the highway unlawfully, the burden of proving this fact is upon the defendant; but, if the defendant introduces evidence that the automobile was duly registered by a former owner, that this registration had expired

Way (*continued*).

about three months before the accident, and that the car still bore the number of the old registration, and the plaintiffs, of whom one is the owner, put in no evidence of any later registration, it cannot be said as matter of law that the evidence of the defendant may not be found by the jury to be sufficient to sustain the burden of proof upon this issue. *Feeley v. Melrose*, 329.

Using automobile upon highway and displaying only number of registration which had expired is violation of St. 1903, c. 473, § 1, as amended by St. 1905, c. 311, § 2, and St. 1906, c. 112, § 8, and makes owner and persons in automobile trespassers, see AUTOMOBILE, 4.

Action by one who, while riding on bicycle, ran into barrier which negligently had been left in way by employees of city who had been using steam roller, see NEGLIGENCE, 57; *ante*, 1, 2.

Use by automobiles.

Statutes regarding use of motor vehicles, which were construed so as not to abrogate, with regard to automobiles, rules of street commissioners of Boston, adopted under authority of previous statute, see AUTOMOBILE, 2, 3.

Other cases regarding use of highways by automobiles, see AUTOMOBILE, 4; PRACTICE, CIVIL, 4, 5.

WILL.

Execution.

1. Upon the issue of the execution of a will, it appeared that the alleged testatrix was a woman of superior education, intelligent and self-reliant, and that she was stopping temporarily at a hotel in the city of New York for the purpose of starting in a day or two on a voyage to Europe, that she had procured a blank form for making a will, which had a printed exordium, leaving blank spaces for the name and residence of the person making the will, and, after an extensive blank space for the body of the will, had a printed *in testimonium* clause and below it a printed clause of attestation to be signed by witnesses, that there were three dotted lines indicating where the subscribing witnesses were to sign, but that there was no line dotted or otherwise between the *in testimonium* clause and the attestation clause indicating where the testator was to sign, that the alleged testatrix filled in the blank spaces in the exordium by writing in her name and residence, crossing out inapplicable printed words, and wrote in the blank space provided for the body of the will about twenty bequests, dealing with her estate with great detail in clear and intelligent language, that, after the attestation clause and below the three dotted lines indicating the places for the signatures of the witnesses, she wrote a clause nominating executors and requesting that they should be required to give no bonds, that, before the witnesses signed, every written word of the instrument was in the handwriting of the alleged testatrix, that she then took the instrument to another woman stopping at the same hotel and asked her to sign it as a witness to her will, saying that it required three witnesses, that the alleged

testatrix sat down and wrote something on the paper which the witness did not read and then handed it to the witness who signed her name where the alleged testatrix told her to, that the alleged testatrix was by the side of the witness when she signed, that later on the same day two other witnesses also signed the attestation clause in the presence of the alleged testatrix after she had told them that the instrument was her last will and had asked them to sign as witnesses but had not otherwise mentioned her signature nor called it to their attention, that shortly afterwards the alleged testatrix caused this instrument to be deposited in her safe deposit vault box, where it remained until her death. *Held*, that this evidence warranted a finding that when the alleged testatrix wrote her name in the exordium of the instrument she intended it to be the signing of her will, and that this intent continued when all of the witnesses signed, and that therefore the will was properly signed and the signature properly attested in accordance with the requirements of R. L. c. 135, § 1. *Meads v. Earle*, 553.

Wills of Married Women.

2. History of legislation in this Commonwealth concerning the testamentary power of married women, recounted by BRALEY, J. *Bunnell v. Hixon*, 468.
3. Although the will of a married woman takes effect only at the time of her death, the consent in writing to such a will executed by the husband of the testatrix waives only such rights as were given by statutes in existence when he signed the consent, and does not waive different rights given to him by subsequent statutes, which are in force at the time of his wife's death. *Ibid*.
4. A married woman died testate in 1908 and her will was allowed in that year. It was executed on October 30, 1901, and on that day her husband executed at the end of it his assent in writing to the will. The will contained no devise or legacy to him or for his benefit. No child was born of the marriage. When the will was executed, the provisions of St. 1900, c. 450, §§ 5-7, had not been repealed, but they were repealed before they went into effect by the Revised Laws, which went into effect from and after December 31, 1901, so that the provisions of Pub. Sts. c. 147, § 6, as amended by Sts. 1884, c. 301, 1885, c. 255, and 1887, c. 290, were in force. At the time of the death of the testatrix the provisions of R. L. c. 135, §§ 1-16, and c. 140, § 3, cl. 3, were in force, which give a surviving husband a right to waive the provisions of his wife's will and to claim such portions of her estate as he would have taken if she had died intestate, and also give him a larger interest in the real and personal property of his deceased wife than was given by the statutes in force when the will was executed or by those which were repealed by the Revised Laws. *Held*, that the effect of the consent in writing by the husband to the will of his wife in October, 1901, was to waive his statutory rights as they existed at that time and that he had not waived the different rights given him by later statutes, so that at the time of his wife's death she had not the testamentary power to deprive him of the right to claim and to receive the same share or interest which he would have taken if she had died intestate. *Ibid*.

Effect of Foreign Will.

5. Statement by MORTON, J., of the rule of law that the will of a person who dies testate and domiciled in another State, leaving property in this Commonwealth, shall be interpreted according to the law of the State where the testator was domiciled at the time of his death, and of some of the exceptions thereto. *Jacobs v. Whitney*, 477.

See also DEVISE AND LEGACY, 1.

Land in this Commonwealth, undertaken to be devised by will of one, who died domiciled in another State and whose will has been proved in that State only, may be treated as intestate property in this Commonwealth in suit to redeem it from tax sale, see TAX, 9.

Undue Influence of Testator.

What constitutes undue influence sufficient to invalidate will, see UNDUE INFLUENCE, 1, 2.

Action of contract based on consideration of forbearance from litigating claim that will of father of plaintiff and defendant was procured by undue influence of defendant, wherein it was held that contract was supported by good consideration and that fact that defendant was executor and had promised to pay plaintiff amount of general legacy made to her in will-estate being insolvent, did not cause contract to be barred by R. L. c. 74, § 1, c.l. 1, see CONTRACT, 3-5, 10; FRAUDS, STATUTE OF, 1.

WITNESS.

Cross-examination.

1. A witness, who testified as a medical expert for the defendant at the trial of an action for personal injuries, stated that he had examined the plaintiff in the presence of her own physician and that the plaintiff's physician had taken from his pocket and read to the witness portions of a letter from another physician, a throat and nose specialist, who had examined the plaintiff's nose, and that the witness had taken notes of what the plaintiff's physician read. On cross-examination the witness stated again that he "took down what" the plaintiff's physician read to him. Subject to an exception by the defendant he then was asked, "Well, you said 'swelling.' If . . . [the plaintiff's physician] . . . read a 'marked swelling,' you didn't get that?" and answered "I have no recollection." Held, that the exception must be overruled, because the plaintiff had a right to cross-examine the witness as to the grounds of his opinion, and that whatever was said at his examination of the plaintiff was competent, even if the inquiry extended to trivial details. *Minihan v. Boston Elevated Railway*, 402.
- Plaintiff in cross-examining witness called by defendant may use him as expert if he can qualify him as such, although defendant did not offer him as expert. In this case witness was held not to be qualified, see EVIDENCE, 3, 5.
- Certain answers, while being cross examined, of plaintiff in action against employer for injuries caused by defective machine, which were held not as matter of law to mean that plaintiff was negligent or had assumed risk of injury, see NEGLIGENCE, 24.

Where plaintiff, who has testified from memoranda as to his business, is cross examined as to memoranda by counsel for defendant, who took memoranda into his possession to do so, plaintiff may offer memoranda in evidence and judge may admit them, see EVIDENCE, 12.

Case where, in cross-examination of witness in taking of his deposition, long statement as to matters in controversy in action by employee against employer for personal injuries, made by third party, was read into record, and where judge presiding at trial of action was held not to have acted improperly in permitting such part of deposition to be read to jury, see *post*, 3.

Whether answer of plaintiff, in cross-examination as to certain custom, to carefully prepared question, which gave to custom as to which he had testified in direct examination different aspect and one unfavorable to his contentions, should be adopted as true, was held to be question for jury, and judge was held to have been warranted in refusing to instruct jury on basis solely of such answer in cross-examination, see PRACTICE, CIVIL, 8.

Attempt to intimidate.

2. Evidence of an attempt to intimidate an adverse witness in order to dissuade him from testifying is inadmissible in the absence of evidence tending to show some connection of the party, against whom the witness was to testify, with the acts of intimidation. *Minihan v. Boston Elevated Railway*, 402.

Deposition.

8. It cannot be said as a matter of law that it was not within the discretion of the judge presiding at a trial to permit the reading to the jury of a portion of the cross-examination of a witness whose testimony was taken by deposition, in which the cross-examiner read to the witness a long report by another person of an interview which he had had with the witness, which report was set out in full in the deposition, and which the witness in effect assented to as a true report of the interview, for the purpose of showing through a question immediately following the reading of the report, by the fact that there was no account in the report of a certain fact as to which the witness previously had testified, that the witness had first told any one of that fact at a time subsequent to the interview, although the report thus read to the witness contained many matters in themselves wholly immaterial and incompetent. *Greibenstein v. Stone & Webster Engineering Corp.* 431.

Fees in Criminal Cases.

Chief of police of Norwood, attending court at Dedham to prosecute criminal cases in District Court of Northern Norfolk in course of duties for which he was paid salary, was not allowed to collect witness fees, see POLICE, 1-3.

WORDS.

"Amount." See *Jones v. Gane*, 37, 43.

"And." See *Jacobs v. Whitney*, 477, 483.

"Carriage." See *Commonwealth v. Goldman*, 400, 401.

Words (continued).

- "Entering." See *Cheney v. Assessors of Dover*, 501, 503.
- "Entire estate." See *Jones v. Gane*, 37, 42.
- "Filing." See *Cheney v. Assessors of Dover*, 501, 503.
- "Future earnings." See *William Gilligan Co. v. Casey*, 26, 32.
- "Future wages." See *William Gilligan Co. v. Casey*, 26, 32.
- "Refusal." See *Weston v. Railroad Commissioners*, 94, 96.
- "Renewal." See *Allen v. Chicago Pneumatic Tool Co.* 569, 574.
- "Residuary clause." See *Jones v. Gane*, 37, 43, 45.
- "Satisfactorily." See *Fechteler v. Whittemore*, 6, 10.
- "Share." See *Jones v. Gane*, 37, 43, 44.
- "Then living." See *Jacobs v. Whitney*, 477, 482.
- "Under lawful age and without issue." See *Jacobs v. Whitney*, 477, 482, 483.
- "Vested." See *Jacobs v. Whitney*, 477, 481.
- "Wholesale." See *Commonwealth v. Greenwood*, 124, 126, 127.
- "Wilful." See *Vermilye v. Postal Telegraph Co.* 593, 604.

WRIT OF PROHIBITION.

1. A writ of prohibition is granted only to restrain a tribunal from acting in matters outside its jurisdiction, and does not lie to correct the errors of a tribunal acting within its jurisdiction. *Welch v. Fox*, 113.

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